TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 355.

WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

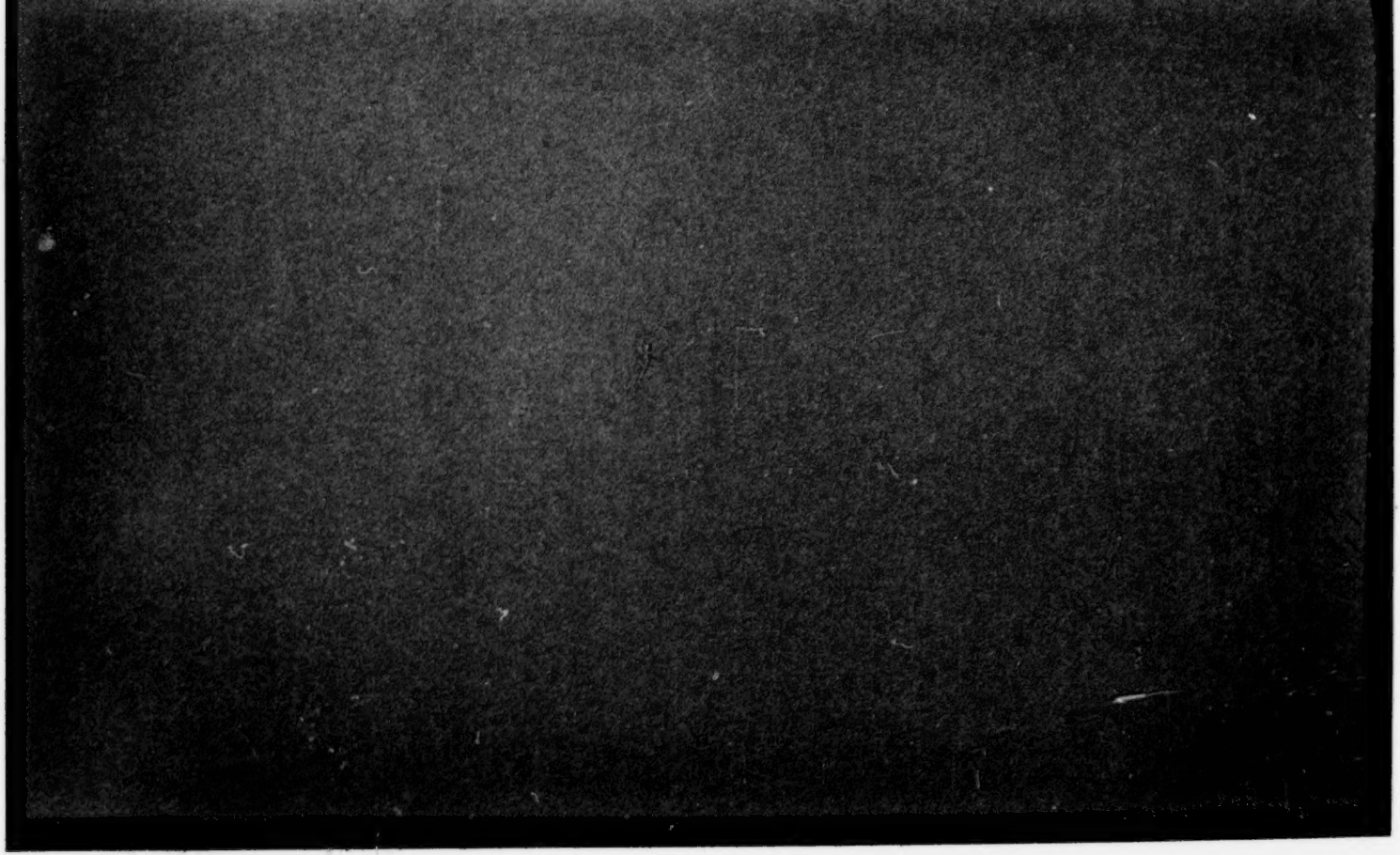
vs.

WILLIAM BROWN AND ROSA BROWN, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED OCTOBER 9, 1913.

(23,377)



(23,377)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 355.

WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM BROWN AND ROSA BROWN, HIS WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

	Original.	Print
Caption	1	1
Case and exceptions	1	1
Complaint	2	1
Amended answer	3	2
Plaintiffs' testimony	5	4
Testimony of Fredericka Alston	5	4
Rosa Brown	7	5
William Brown	13	9
Motion for non-suit	16	11
Motion for non-suit	17	11
Defendant's testimony	18	12
Deposition of Amos Adams	18	12
Testimony of Wm. T. Robey	21	14
Erastus A. Barnard	25	17
Samuel E. Mastin	28	20
Robert G. Callum	35	24
William W. Millan	43	30
Tracy L. Jeffords	56	39
Deposition of Wm. W. Millan	62	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1913.

	Original.	Print
Motion for non-suit	72	49
Judge's charge to jury	73	50
Verdict	84	58
Exceptions	84	58
Opinion by Gary, C. J.	91	62
Petition for writ of error	93	63
Assignment of errors	95	64
Order fixing bond, &c.	102	68
Writ of error	105	69
Proof of service of citation	108	70
Citation and service	110	71
Citation (original)	113	72
Order allowing writ of error	115	73
Bond on writ of error	117	73
Præcipe for record	123	76
Clerk's certificates	126	77

1 Supreme Court of S. C. Filed Oct. 2, 1911. U. R. Brooks, Clerk.

STATE OF SOUTH CAROLINA:

In the Supreme Court, Ninth Circuit, Charleston County.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents.

vs.

WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Logan & Grace, Attorneys for Plaintiffs-Respondents.
Mitchell & Smith, Attorneys for Defendant-Appellant.

Case and Exceptions.

This action was commenced March 31, 1908, by the service of the summons and the following complaint:

2 *Complaint.*

The plaintiffs above named complaining of the defendant above named alleges and says:

First. That the plaintiffs are informed and believe said defendant Western Union Telegraph Company is a corporation created by and under the laws of the State of New York, and is now, and at the times hereinafter mentioned, was engaged in the business of transmission, transmitting, and delivery for hire of telepraphic messages, and having an office in the town of Summerville, in said State of South Carolina, and in the City of Washington, in the District of Columbia.

Second. That on or about the 22d day of January, 1908, at about the hour of two o'clock P. M., a telegraphic message was delivered at the Summerville office of said defendant corporation, addressed to the said plaintiff Rosa Brown, and reading as follows:

"Jan. 22, 1908. Summerville, S. C. Mrs. W. M. Brown, 72 Canal Street, S. W. Washington, D. C. Come at once. Your sister died this morning. Fredericka Alston." And said defendant corporation agreed to promptly transmit and deliver said message to the addressee thereof, the said Mrs. W. M. Brown, the plaintiff herein, in the said City of Washington, in the District of Columbia.

Third. That although said telegraphic message was a death message and gave notice to said defendant corporation of the importance of its prompt transmission to the addressee thereof, yet said defendant corporation so carelessly, negligently, recklessly, and wantonly performed its duty in that regard, that said telegraphic message was not only not delivered within a reasonable time, but said message was not delivered at all.

Fourth. That if said message had been delivered promptly or within a reasonable time the said plaintiff, Rosa Brown, would have been informed of the death of her said sister and would have immediately telegraphed a reply message to Summerville stating that she would come on to the funeral of her sister, and if such message had been received the funeral of plaintiff's sister would have been
3 postponed until said plaintiff could have arrived, and said plaintiff would have left the City of Washington in time to have had the great and inestimable privilege of gazing upon the face of her dead sister, of attending her funeral services, and of performing the last sad rites attending the burial of her said sister.

Fifth. That by reason of the carelessness, negligence, recklessness, and wantonness of said defendant corporation its agents and servants as above set forth, the said plaintiff, Rosa Brown, was deprived of the great and inestimable privilege of gazing upon the face of her dead sister, of attending her funeral services, and of performing the last sad rites at the burial of her said sister, (and was not even informed of the death of her said sister until her arrival in Summerville, whereby she was subjected to great mental anguish and suffering to her damage fifteen hundred dollars.

Sixth. That the said William Brown is the husband of the said Rosa Brown, and is joined with her as plaintiff as required by law in such cases made and provided.

Wherefore, plaintiffs pray judgment in the sum of fifteen hundred dollars and the costs of this action.

LOGAN & GRACE,
Plaintiffs' Attorneys.

(Verified.)

Amended Answer.

The defendant above named, answering the complaint herein, alleges and shows as follows:

1. It admits the allegations of the first article of the said complaint.

2. It admits that on or about two o'clock on the 22d day of January, 1908, the message set forth in said second article of the complaint was filed at defendant's office in Summerville, for transmission to the addressee named therein, and denies the other allegations thereof.

3. Answering the third article of said complaint, this defendant denies the same.

4 4. Answering the fourth article of said complaint, this defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

5. Answering the fifth article of said complaint, this defendant denies the same.

6. This defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the sixth article of the complaint.

7. And further answering said complaint and for a further defence thereto, this defendant shows and alleges that if there was any delay in the transmission of the said message and any damage caused thereby to the plaintiffs, that said delay occurred at Washington, in the District of Columbia, and outside of the State of South Carolina and in the District of Columbia, in which District the law prevails which does not permit a recovery for mental anguish unaccompanied by bodily injury.

8. And further answering said complaint and for a further defence thereto, this defendant shows and alleges that if there was any delay in the transmission of the said message and any damages caused thereby to the plaintiff, that said delay occurred in Washington, in the District of Columbia, and outside of the State of South Carolina, and in the District of Columbia, in which District the law prevails which does not permit a recovery of punitive damages against a master, whether a corporation or an individual, for the wilful, wanton or reckless tort of a servant, unless the master counsels, participates in, or actively ratifies such tort.

9. And further answering the said complaint and for a further defence thereto, in so far as the same attempts to set forth a cause of action based on negligent tort, this defendant shows that the said message was promptly and correctly transmitted from the State of South Carolina to the City of Washington, in the District of Columbia, and that there was no negligence or breach of duty on the part of the defendant within the limits of the State of South Carolina, and that the only negligence or breach of duty on the part of the defendant, if any there was, occurred exclusively and solely within the limits of the District of Columbia, and therefore, this defendant says that the Statute of South Carolina, known as the Mental Anguish Statute, being Sec. 2223 of the Civil Code of South Carolina, if construed as applying to and authorizing recovery of damages for mental anguish unaccompanied by physical injury for non-delivery of the said message, is unconstitutional and void, because in contravention of.

(*a*) Article I, Section 8, Sub-division 3 of the Constitution of the United States, conferring on Congress power to regulate commerce among the several States; and

(*b*) Because in contravention of Article I, Section 8, Subdivision 17, of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia; and

(*c*) Because in contravention of that part of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Wherefore defendant prays that said complaint be dismissed with costs.

MITCHELL & SMITH,
Attorneys for Defendant.

(Verified.)

The case came on for trial before his Honor, Judge G. W. Gage, and a jury, at the June term of Court, 1911, and the following proceedings were had:

Plaintiffs' Testimony.

FREDERICKA ALSTON sworn.

Direct examination by Mr. LOGAN:

Q. Where do you live?
A. Summerville, S. C.
Q. Do you know Rosa Brown?
6 A. Yes, sir.
Q. She is the plaintiff in this case?
A. Yes, sir.
Q. Do you know William Brown?
A. Yes, sir.
Q. Who is Mrs. William Brown?
A. Rosa Brown.
Q. Who is William Brown?
A. Rosa Brown's husband.
Q. Is Rosa Brown and Mrs. William Brown the same person?
A. Yes, sir.
Q. Did you on the 22d day of January, 1908, send a personal message to the plaintiff in this case, Mrs. William Brown?
A. Yes, sir.
Q. How did you come to send that message?
A. Her sister died and I went to the telegraph office and asked them to telegraph her.
Q. You sent this message to the office?
A. Yes, sir.
Q. Whose sister was it who died, Rosa Brown's?
A. Rosa Brown's; yes, sir.
Q. That was Mrs. W. M. Brown's sister?
A. Yes, sir.
Q. Suppose that Rosa Brown had telegraphed you from Washington that she was coming to the funeral of her sister, would you or not have had it postponed?
A. Yes, sir; we would have postponed it.
Q. So that she could be present?
A. Yes, sir.
Q. That is why you sent the message, so that she could come on?
A. Yes, sir; that is why I sent it.

Cross-examination by Mr. MITCHELL:

Q. Did you live with Rosa Brown's sister?
A. No, sir.
Q. Who lived there with her?
7 A. Her mother.
Q. Anybody else living there?
A. Yes, sir; some nieces, but they were young.

ROSA BROWN sworn.

Direct examination by Mr. LOGAN:

Q. Where do you live?
A. Summerville, S. C.
Q. Are you living in Washington now, at the present time?
A. Yes, sir.
Q. Where were you living on the 22d January, 1908?
A. Washington, D. C.
Q. Are you Mrs. William M. Brown?
A. Yes, sir.
Q. Who is Rosa Brown?
A. I am.
Q. Who is Wm. M. Brown?
A. My husband.
Q. Did you ever see this message, "Come at once——
A. No, sir.
Q. Were you or not living at 72 Canal Street, S. W. Washington, on January 22, 1908?
A. Yes, sir.
Q. At that time you were living just where this message was addressed?
A. Yes, sir.
Q. Did you have a sister in Summerville?
A. Yes, sir.
Q. She was dead?
A. Yes, sir.
Q. What was her name?
A. Livinia Govan.
Q. Suppose you had gotten this message promptly, or in a reasonable time, would you have gone to Summerville to attend the funeral services?
A. Yes, sir.

8 (Mr. Mitchell objects to the question as leading.)

Q. What would you have done if you could not have gotten there promptly?
A. I would have sent my mother a telegram and asked her to keep her until I got there.
Q. Would you or not have come home at once, or sent this telegram, so you could get there in time for the funeral?
A. Yes, sir; I would have sent a telegram asking them to wait until I got there.
Q. How did you happen to come to Summerville?
A. I got a letter from my niece saying my sister was very sick.
Q. When you got that letter did you immediately come on in response to that letter?
A. Yes, sir; I came that night.
Q. When you got to Summerville what did you find?
A. She was dead and buried.
Q. Was that or not the first time you knew she was dead?
A. Yes, sir; that was the first time.

(Mr. Mitchell moved to strike out the question and answer as to when she got to Summerville and found her sister was dead, on the grounds that the testimony is immaterial and irrelevant, as based upon the allegations of the pleadings at this trial.)

By the COURT:

Q. When was it you came to Summerville; how long after the burial?

A. The second day. She died on the 22d and I got the letter on the 24th. She died Wednesday and I got the letter on Friday.

Q. Then you came?

A. Yes, sir.

(Mr. Mitchell objected to all of the above questions and
9 answers on the grounds above stated. Objection overruled.)

(Mr. Mitchell noted exception on the ground that the telegraph company is not sued here for mental anguish caused by the death of the plaintiff's sister, and any suffering she may have been caused by the knowledge that her sister was dead, and that as to where she received that information is irrelevant and it was outside and entirely apart and disconnected from the message that was sent to her, and which is the basis of the cause of action sued on here.)

Q. Rosa, when did you get this letter?

A. On the 24th.

Q. When you got that letter what did you do?

A. I began to pack my trunk.

Q. To come on?

A. Yes, sir.

Q. Did you come immediately in response to that letter?

A. Yes, sir.

By the COURT:

Q. What was the date of the letter?

A. That letter was dated 22d; I got it on the 24th.

By Mr. LOGAN:

Q. When you got to Summerville, when did you first hear of the death of your sister?

A. I did not hear until I got home in the house.

(Mr. Mitchell objects to all of the above testimony on the grounds set out above.)

Q. If you had gotten the telegram, when could you have left Washington?

A. Quarter to four.

Q. If you had gotten the telegram?

A. Yes, sir.

10 By the COURT:

Q. In the afternoon?

A. Yes, sir.

Q. You did come on as soon as you got the letter?

A. Yes, sir.
Q. So that you would have done the same if you had gotten the telegram?
A. Yes, sir.
Q. Was your sister buried when you got to Summerville?
A. Yes, sir.
Q. You did not get there in time to attend the funeral services?
A. No, sir.
Q. Were you fond of your sister?
A. Yes, sir.
Q. Were you not sorry at not being able to see her?
A. Yes, sir.
Q. Who is William M. Brown?
A. My husband.
Q. What is his occupation?
A. He was working in the Post Office Department then.
Q. What now?
A. Fireman in the Census Building.
Q. He is in court here?
A. Yes, sir.
Q. Do you know whether or not the funeral would have been postponed if you had gotten the telegram?
A. Yes, sir.

(Mr. Mitchell objects on the ground that that is hearsay testimony.)
(Objection sustained.)

Q. What did you do when you got the letter saying your sister was very sick?
A. I began to pack my trunk.
Q. You left Washington when?
11 A. That night.
Q. You left on the same day that you got the letter?
A. Yes, sir.
Q. Would you have done that as soon as you got the telegram, if you had received it?
A. Yes, sir.
Q. The result of that letter was you left Washington immediately?
A. Yes, sir.
Q. Were you not living at that time at the address of the telegram?
A. Yes, sir.
Q. Seventy-second Canal Street, Southwest?
A. Seventy-two.
Q. You were living right where it was addressed?
A. Yes, sir.
Q. You never have received it at all?
A. I never have.

Cross-examination by Mr. MITCHELL:

Q. Were you keeping house there?
A. No, sir; boarding.

Q. Did you not say before that you could have left that night had you gotten the telegram?

A. At a quarter to four.

Q. The complaint says telegram was sent about two. When did you get the letter telling you of the sickness of your sister?

A. About 10 o'clock.

Q. In the morning?

A. Yes, sir.

Q. When did you leave?

A. That night.

Q. What time?

A. The train was late; it left about quarter after nine.

Q. Over the Southern?

A. Yes, sir.

Q. That is the way you always travel to Summerville?

A. Not always; I some times come by Coast Line.

12 Q. You left at nine that night; why, if you had gotten the telegram would you have left at 3:45?

A. The telegram said she was dead, but the letter only said she was very sick.

Q. You were prepared to come immediately, on the notice of an hour?

A. Was I prepared to come?

Q. Yes.

A. No, sir; I had to get ready to come.

Q. Had to get money and tickets, etc.?

A. Yes, sir

Q. Did you not say in your first testimony that you would have left that afternoon and been in Summerville next after at 7:55?

A. If I would come by the Coast Line. No, sir; I left by the Southern.

Q. At 9 that night?

A. Yes, sir.

Q. Got to Summerville at 7:55; did you not say on your first testimony that you would have taken that same train?

A. No, sir; the Coast Line train.

Q. How did you come to this trial?

A. This trial now?

Q. Yes.

A. I received a telegram.

Q. When did you receive it?

A. Wednesday afternoon.

Q. What time Wednesday afternoon?

A. About four o'clock.

Q. When did you leave Washington?

A. I left Washington Friday afternoon at quarter after six; no, Thursday afternoon, quarter after six.

Q. When did you get to Charleston?

A. Something after 12, I think.

Q. In the day?

A. Yes, sir.

Q. 1:50 wasn't it; nearly 2 o'clock?

A. Yes, sir.

Q. Yet that telegram told you to be here Friday morning?

13 A. Yes, sir; but we could not get here right then.

Q So you got it Wednesday afternoon at 4 and you did not leave until Thursday afternoon at 6 something?

A. Yes, sir.

Q. You are living in Summerville now?

A. No, sir; I live in Washington, D. C.

Q. Is that your home?

A. Summerville is, but I live in Washington.

Q. Been living there for the last three years?

A. Not steady, sir.

Q. Where was William Brown on the 22d January, 1908?

A. In Washington.

Q. What was the name of the person who kept the boarding house?

A. Mrs. Dodson; she did not keep a boarding house; she just boarded me.

Redirect examination by Mr. LOGAN:

Q. This is the third trial of your case?

A. Yes, sir.

Q. You have been here three times to get a trial of your case?

A. Yes, sir.

Q. Won it every time?

A. Yes, sir.

Q. You testified you would have telegraphed to them to hold the body if you could not have gotten there right away?

A. Yes, sir.

WILLIAM BROWN sworn.

Direct examination by Mr. LOGAN:

Q. William, where do you live?

A. In Summerville.

Q. Are you living in Washington; Summerville is your home, but you live in Washington now?

14 A. I live in Washington for the present.

Q. What is your occupation?

A. I run the steam apparatus in the Census Building.

Q. You are fireman there?

A. Yes, sir.

Q. You are a South Carolina negro?

A. Yes, sir.

Q. Born and raised in South Carolina?

A. Born and raised in South Carolina; yes, sir.

Q. Did you not work for 6 or 8 years for the Southern Railway?

A. Yes, sir.

Q. Where were you living on the 22d January, 1908?

A. 72 Canal Street, South Washington.

Q. Has or not that house a number?
A. Yes, sir; a large number.
Q. Anybody can see where 72 Canal Street is?
A. Yes, sir; anybody can see the number.
Q. Now, do you know whether any telegram came to your wife from Summerville, on or about 22d day of January, 1908?

(Objection, by Mr. Mitchell, that he can say whether he got any telegram, but not whether anybody else got a telegram.)

Q. Do you know whether or not as a fact any telegram came there that day?
A. No, sir; no telegram came.
Q. Did you get any?
A. I did not.
Q. Did you get any for your wife?
A. Did not any come there that day. I was home all day and the lady of the house that boards us she was out all day, and there was nobody there but me and my wife that day.
Q. No message came there at all?
A. No message came at all.
Q. How long had you been living in Washington at that time?
A. At that time it would have been two years and three months.
Q. You were living in Washington then?
A. Yes, sir.
Q. You were employed where?
A. In the Post Office Department at that time.
Q. What kind of business?
A. Attending to the steam apparatus; ran the elevator and steam pumps.
Q. Are you on leave of absence now?
A. Yes, sir.
Q. Where were you born?
A. Three miles from Columbia, S. C., raised on a place known as Child's; used to be owned by Mr. Childs.
Q. Are you the husband of Rosa Brown?
A. Yes, sir.
Q. Joined with her as plaintiff in this case?
A. Yes, sir.
Q. You are sure that nobody came there that day with a telegram?
A. Yes, sir; no telegram came there that day, because I was there all day, and the lady of the house was out.
Q. Has the telegram ever been received?
A. No, sir; never has been.

Cross-examination by Mr. MITCHELL:

Q. Where did you say you were living there?
A. 72 Canal Street, South Washington.
Q. You are sure that was the place you were living?
A. Yes, sir; sure.

Q. 72 Canal Street, South Washington; Washington where?
A. Washington, D. C.
Q. District of Columbia?
A. Yes, sir.
Q. You knocked off work at 8 o'clock that morning?
A. Yes, sir; working all night, eight hours.
Q. Knocked off at 8 in the morning?
A. Yes, sir.

16 Redirect examination by Mr. LOGAN:

Q. S. W. is Southwest?
A. Yes, sir.

(Mr. Mitchell objected to the foregoing question as leading.)

By the COURT:

Q. Where were you living?
A. South Washington, S. W., the way we always signed to have a letter to come to us.

By Mr. LOGAN:

Q. Is not Washington divided into four sections?
A. Yes, sir; Southwest, Southeast, Northwest and Northeast.
Q. And you were living there; S. W. means Southwest?
A. Yes, sir.
Q. Is that your correct address?
A. Yes, sir.
Q. A telegram addressed there would have been delivered there had it been correctly addressed?
A. Yes, sir.

By Mr. MITCHELL:

Q. You say Washington is divided into four sections, Northeast, Northwest, Southeast and Southwest, is that correct?
A. Yes, sir. Four parts; Southwest is the part where I live and where my letters come.

Motion for Non-suit.

At the close of the plaintiff's case the defendant moved the Court for a non-suit on the following grounds:

Because there is not only no allegation in the complaint, but no testimony whatsoever, that plaintiff paid or promised to pay,
17 for the transmission of the message or that the sender paid or promised to pay therefor, or that there was any consideration to the defendant.

The motion was overruled and non-suit refused.

Motion for Non-suit.

At the close of the plaintiff's case the defendant moved for a non-suit as to the cause of action based on negligent tort (only)

on the ground that it affirmatively appears from the plaintiff's own case that the message sued on was an interstate message and that it does not appear that there was any default or breach of duty with regard thereto on the part of the defendant within the territorial limits of the State of South Carolina, and the defendant maintains that the Statute of South Carolina entitled, "An Act to allow "damages against Telegraph Companies doing business in this State, for mental anguish or suffering, even in the absence of bodily injury caused by negligence in receiving, transmitting or delivering messages," approved the 20th February, 1901, (Stat. S. C., Vol. 23, page 748), which Act is the foundation of the cause of action based on negligent tort, is, if construed as applicable to the message in this case, unconstitutional and void, because in contravention of three parts of the Federal Constitution, to-wit:

(*a*) Article 1, Section 8, Subdivision 3 of the Constitution of the United States conferring on Congress power to regulate commerce among the several States, and

(*b*) Article 1, Section 8, Sub-division 17 of the Constitution of the United States conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and

(*c*) That part of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Which motion was overruled and non-suit refused.

18 *Defendant's Testimony.*

The defendant then introduced its testimony, as follows:

Deposition of AMOS ADAMS, read to the jury as follows:

Direct examination.

By Mr. STARK:

Q. Where do you reside?
A. 423 S Street, Northwest, Washington, D. C.
Q. How old are you, Mr. Adams?
A. Sixty.
Q. What is your occupation?
A. Telegraph operator.
Q. Where were you employed on the 22d day of January, 1908?
A. In the Western Union Telegraph Company, Washington, D. C.
Q. In the main operating room?
A. In the main operating room; yes, sir.
Q. I hand you a paper, and ask you if you can tell me what it is? (Handing paper to witness, who examined same.)
A. This is telegram No. 43, from Augusta, dated Summerville, South Carolina, January the 22d, received at 2:12 p. m.

Q. January 22d, what year?
A. 1908.

Mr. GRACE: We object to this going in as testimony for two reasons: first, because the telegram has not been properly proven; and second, because if it is properly proven, it speaks for itself.

Mr. STARK: Go right ahead and answer the question, Mr. Adams. You had not finished, had you?

A. I have finished that part of it.

19 Q. Who received that telegram, if you know?
A. I did.

Mr. GRACE: At this point we object to all testimony showing or tending to show any delay outside of the State of South Carolina, the point of origin of the message, as being incompetent, immaterial and irrelevant. If this testimony bears on that point, we object to it, because we have filed a demurrer objection to certain allegations in the answer of the defendant company, and until the demurrer is heard we want to save the objection.

Mr. STARK: That is understood.

Q. Did you receive that message yourself?
A. I did.
Q. When?
A. At 2:12 P. M., January 22, 1908.
Q. And that came to you from what office?
A. It came to me from Augusta, Georgia, as No. 43.
Q. Did you write that out as it came to you?
A. I did.
Q. What was then done with the message, if you know?
A. I put it in the clip on top of the table—there is a little clip there on top of the table—and the file boy sent it down to the delivery department.

Mr. GRACE: We object to that. You can't tell what the file boy did.

Mr. STARK: We offer the paper in evidence.

The paper referred to is offered in evidence and attached to the deposition, and marked "Defendant's Exhibit No. 1."

Mr. GRACE: We object to the introduction of the paper, because it is not the original document.

Q. You may state whether or not this is in your handwriting?
A. It is.

20 Cross-examination.

By Mr. GRACE:

Q. Mr. Adams, you say that is in your handwriting?
A. Yes, sir.
Q. That paper itself is not in your handwriting, is it?
A. Yes, sir.
Q. Isn't that a press copy?
A. It is a press copy of my writing—it is an impression of the message that I received.

Q. That is all it is—a press copy?
A. It is my handwriting—I identify that.

Redirect examination.

By Mr. STARK:

Q. According to the course of business in a telegraph office, when a message is received over the wire by a receiving operator, does he write down the message as he receives it?
A. He does.
Q. And the copy that he so makes—the original wire copy—according to the course of business, what is done with that original copy?
A. That is, as I said, put into a clip on top of the table, and the file boy takes it, and if it is a city message he drops it to the delivery department.
Q. But is it or is it not delivered to the addressee in the ordinary course of business—the original copy?
A. It is supposed to be.

Mr. GRACE: We object to what is supposed to be.

Q. And what, if any, record is kept in the telegraph office of the message which is so delivered to the addressee?
A. They make an impression copy of it, and it is entered on the delivery sheet, with the number—I think they put it on the delivery sheet—of the messenger boy.
Q. What is done with the press copy which they make?
A. They keep that.
21 Q. And do you or not identify this paper, Exhibit 1, as the press copy so made of a message which had been received by you, and the original of which message was in your handwriting?
A. I do.

Mr. STARK: That is all.

Whereupon WILLIAM T. ROBEY, a witness presented on behalf of the defendant, being first cautioned and sworn to tell the whole truth, deposes and testifies as follows:

Direct examination.

By Mr. STARK:

Q. Mr. Robey, what is your age and residence?
A. Age, nineteen.
Q. And your residence?
A. Berwyn, Maryland.
Q. What is your occupation?
A. Assistant delivery clerk, Western Union.
Q. Where?
A. Fourteenth and F, Washington, D. C.
Q. Is that the main office in Washington?
A. Yes, sir.

Q. Were you there on January 22, 1908?
A. Yes, sir.
Q. And were you in the same position on that date?
A. Yes, sir.
Q. I hand you a paper and ask you if you can tell me what it is? (Handing paper to witness, who examined same.)

Mr. GRACE: We object to this on the same ground, that is, of the irrelevancy and incompetency of this testimony, as bearing on the question of mental anguish in South Carolina.

22 A. Yes, sir; it is a messenger boy's delivery sheet.
Q. Well, go on; is that all you know about it?
A. On which messages are routed out.
Q. Did you ever see that sheet before?
A. Yes, sir.
Q. When did you first see it?
A. January 22, 1908.
Q. And under what circumstances did you see it?
A. The messages which are shown thereon were handed to the boy, No. 31, for him to deliver.
Q. Who handed them to the boy?
A. I did.
Q. Did you make any entry on the sheet at that time?
A. Yes, sir.
Q. What entry did you make?
A. The messages, or numbers rather, and the addresses are in my handwriting.
Q. And is the time in your handwriting?
A. Yes, sir.
Q. Can you state, after looking at that delivery sheet, at what time you sent out the boy, No. 31; the messenger indicated on the sheet?
A. He was sent out at 2:45 P. M.
Q. That date—is it or not in your handwriting?
A. It is in my handwriting.

Mr. GRACE: Do you offer that in evidence?
Mr. STARK: Yes, I offer the sheet in evidence.
The same is accordingly filed herewith, attached to the deposition, and marked "Defendant's Exhibit No. 2."

Q. Were you on duty when that delivery sheet was returned by the messenger who had these messages?
A. I was on duty; but it was not returned to me.
Q. It was not returned to you?
A. No, sir.

Mr. STARK: That is all.

23 Cross-examination.

By Mr. GRACE:

Q. You say that this is all in your handwriting—the addresses of the parties?
A. The addresses where the messages were routed out to.

Q. For instance, "Munsey Building;" is that in your handwriting?
A. Yes, sir.
Q. And 72 Canal Street?
A. Yes, sir.
Q. These are both in your handwriting?
A. Yes, sir.
Q. Well, what about the other writing on this, that is, the lead pencil writing?
A. That is not in my handwriting.
Q. What is that supposed to be there—that written before 72 Canal Street?
A. That is supposed to be the signature for the message.
Q. And what is that signature?

Mr. STARK: I object to that unless it is shown that the witness has some source of knowledge.

Q. What do you read that to be?

Mr. STARK: I object to that as immaterial.

A. It looks like Mrs. Wright to me.
Q. It might be Mrs. Wrong. It was in this case—wasn't it?

Question not answered.

Redirect examination.

By Mr. STARK:

Q. According to the course of business, when delivery sheets are returned to the office, what is the duty of the delivery clerk to whom they are returned?
24 A. There is a record kept of each delivery sheet that is sent out of the office, and they are charged out to each boy; and when they are returned they are checked off on this record.
Q. What is the duty of the delivery clerk in checking them off?
A. He is supposed to see that each message is signed for.
Q. Is it or not frequently the case that messages are signed for by the name of some person other than the addressee of the message?
A. Yes, sir; very often.
Q. There is nothing unusual about a discrepancy between the addressee of the message and the name of the particular person who signs for the message?
A. No, sir.

Mr. STARK: That is all.

Recross-examination.

By Mr. GRACE:

Q. Mr. Robey, do you mean to say that if a messenger boy comes back, after having delivered a death message, that it would be a matter of no consequence in the office that the receipt for that death message, was in another name entirely from that of the addressee?

A. Nearly all the telegrams sent out—or very few of them, are signed for in the addressee's name.

Q. So that in the case of a death message that would not cause any controversy in the office—the fact that it was signed for by someone else?

A. There is no difference made in these; only that they are sent out with a rush.

Q. No difference made in these at all?

A. No difference made in trying to get the addressee's own handwriting.

Q. You don't take any more pains, then, to deliver a death message than any other message?

A. Yes, sir.

25 Q. You don't take any more pains in trying to see that it has been delivered than any other message?

A. Yes, sir.

Q. What pains do you take?

A. We try to deliver, and it is sent out two or three times.

Q. I understand—that is when you have difficulty in delivering it; but when the message has been delivered you don't take any more pains to see that it has been delivered properly than in the case of any other message?

A. I can't say that we do.

Mr. GRACE: All right—that is all.

Whereupon, ERASTUS A. BARNARD, a witness presented on behalf of the defendant, being first cautioned and sworn to tell the whole truth, deposes and testifies as follows:

Direct examination:

By Mr. STARK:

Q. Where do you reside, Mr. Barnard?

A. Brentwood, Maryland.

Q. What is your occupation?

A. Delivery clerk, Western Union Telegraph Company, main office.

Q. At Washington, D. C.?

A. Washington, D. C.

Q. And was that your occupation and position on January 22, 1908?

A. It was.

Q. I hand you defendant's Exhibit No. 2, and ask you if you know what it is?

A. It is a Western Union delivery sheet.

Q. Did you ever see it before, and if so, under what circumstances and when?

A. It was returned to me January the 22d. I can't say

26 what time; but it was returned to me between 2:45 and 5 o'clock.

Q. And for what purpose was it returned to you, and by whom?
A. It was returned to me by the messenger boy.
Q. What messenger boy?
A. Number 31.
Q. What was his name; do you know?
A. No. I can't say what his name was.
Q. Under what circumstances and for what purpose did he return it to you?
A. He returned it to me to get my signature on that message there—"charged sixty cents."
Q. What are the duties of a delivery clerk to whom a delivery sheet is returned by a messenger?
A. To see that the messages are signed for.
Q. Directing your attention particularly to the last message entered on that delivery sheet, the message numbered 334, addressed to 72 Canal Street, I ask you whether or not there is anything about that delivery sheet that would indicate whether or not that message had been properly delivered at the time the sheet was returned to you?
A. There is nothing there to indicate it was not delivered.
Q. Is there anything to indicate that it was?
A. Only the signature.

Cross-examination.

By Mr. GRACE:

Q. Mr. Barnard, when a messenger boy brings a delivery sheet back to your office, or back to you as delivery clerk, you simply scan it hurriedly, and if there is a name—any name—filled in over the street address, as it appears on that sheet, you file it away as being properly attended to—is that the idea?
A. Yes, sir; so long as it has a signature on the sheet.
Q. It dosen't make any difference whose signature it is—any signature. You simply assume that the messenger boy did his duty?
A. That is right.
27 Q. That is the idea, is it?
A. Yes, sir.
Q. The whole thing is unloaded on the responsibility of the messenger boy; that is the custom, is it not?
A. Yes.

Redirect examination.

By Mr. STARK:

Q. Mr. Barnard, how long have you been delivery clerk?
A. About thirty-five years.
Q. Is it usual or not, when delivery sheets are returned to delivery clerks to be checked up, to find discrepancies between the names of the addressees and the names of the persons who sign for the messages?

Mr. GRACE: We object to that.

A. Sometimes I question a party's signature on the sheet, but——

Q. (Interrupting.) Answer the question. My question was, is it usual or not to have a discrepancy?
A. It is usual to give the boy—no.
Q. Does it sometimes happen?
A. It does.
Q. Are messages addressed to business men, sometimes delivered to their office boys or clerks?
A. They are delivered to anyone in their offices that has authority to sign.
Q. In these cases, do the persons who actually receive the messages sometimes sign their names instead of the names of the persons to whom the messages are addressed?
A. Yes, sir.
Q. Is there anything unusual about that?
A. Nothing.
Q. So that is it or is it not anything to challenge the attention of the delivery clerk that there is a discrepancy in a particular case between the name of the addressee and the name of the person who signs for the message?
A. No, sir.

28 Recross-examination.

By Mr. GRACE:

Q. Have you got any rule—is there a company rule on the subject of delivering telegrams—as to the delivery to the proper person?
A. There is a rule not to deliver them to janitors or elevator boys.
Q. Or what? Or any person not apparently of sound discretion?

Mr. STARK: That is objected to on the ground that it is not the best evidence.
Mr. GRACE: You are proving the rules of the company by this witness. I want to know whether he knows of any rule.

Q. Mr. Barnard, is there any rule of the company requiring the signature of the addressee when the message is delivered?
A. None that I know of.
Q. There is no rule that when a telegram is sent out it must be delivered to the person to whom it is addressed, or his duly authorized agent?

Mr. STARK: That is objected to on the ground that it is not the best evidence.

Q. I ask you if there is any such rule?
Mr. STARK: If you know.
A. There is a rule to give it to the party that it is addressed to—the addressee.
Q. That is the rule?
A. It is.

Mr. GRACE: All right, sir.

Whereupon SAMUEL E. MASTIN, a witness presented on behalf of the defendant, being first cautioned and sworn to tell the whole truth, deposes and testifies as follows:

29 Direct examination.

By Mr. STARK:

Q. Your residence is where?
A. 910 Lawrence Street, Brookland, D. C.
Q. What is your present occupation?
A. Horse shoeing—learning horse shoeing.
Q. How long have you been engaged in that?
A. Seven months—a little over seven months.
Q. And what were you doing on January 22, 1908?
A. Working for the Western Union as a messenger.
Q. Where; in what office?
A. In the main office.
Q. Washington, D. C.
A. Yes, sir.
Q. Now, I hand you defendant's Exhibit No. 2, and ask you if you ever saw that before? (Handing exhibit to witness, who examined same.)
A. I did.
Q. When?
A. On January 22d.
Q. On January 22, 1908?
A. On January 22, 1908.
Q. At what time of day—do you know?
A. At 2:45.
Q. P. M., or A. M.?
A. P. M.
Q. And who gave you that delivery sheet at that time?
A. Mr. Robey.
Q. What did he give you with the delivery sheet?
A. The telegrams.
Q. How many?
A. Six.
Q. Among these telegrams was there one addressed to 72 Canal Street?
A. Yes, sir.
Q. Did you deliver the messages that were not addressed to 72 Canal Street before you went to Canal Street?
A. I did.

30 Q. At what place did you deliver the last of the other five messages?
A. 232 First Street, Northwest.
Q. And when did you deliver that message, if you know—about when?
A. Three-ten.
Q. Three-ten, P. M.?
A. Yes, sir.

Q. What did you do then?
A. I then went to where I thought this other message ought to be delivered.
Q. Did you go to Canal Street?
A. Yes, sir.
Q. What did you do then?
A. I went to the house where I thought this message ought to be delivered.
Q. Where was that house?
A. On Canal Street.
Q. Well, was it near the beginning of Canal Street, or whereabouts on Canal Street?
A. It was near the beginning of Canal Street.
Q. How many blocks long is Canal Street?
A. About two or three squares.
Q. Was this house that you went to on the first block or on what block?
A. It was on the first block.
Q. Did you see any number on it?
A. No, sir; not at the time.
Q. Did you look for number 72?
A. No, sir.
Q. Did you see any number 72 on that block?
A. No, sir.
Q. What did you do?
A. The highest number between the two squares being sixteen, I started in there, and a dog being in the yard between 14 and 16, I went to number 12 and handed the people the telegram and asked them if these people lived there; and a colored woman taken the telegram and said "Yes," and signed for it; and then I delivered the time sheet to the office. It was signed for there.
31 Q. Where did the colored woman sign for the message?
A. Before the address.
Q. In other words, this pencil writing, "Mrs. M—" something that I can't read—was that signature placed there by the colored woman to whom you delivered the message?
A. Yes, sir.
Q. And was it placed there at the time you delivered the message?
A. Yes, sir.
Q. Did she write the time opposite the message, or did you?
A. I wrote that.
Q. You stated that the highest number on the block was 16?
A. Between these two squares?
Q. Yes. How did you notice that if you were not looking for No. 72?
A. I was looking for No. 72.
Q. You were looking for No. 72?
A. Yes, sir.
Q. Did you or not find it?
A. I did not find it.

Q. According to the method in which houses are numbered in the City of Washington, is it usual or not to find the addresses from one to one hundred on the first block of a street?

A. According to the system in Washington, all addresses between the dividing line, the district dividing line, and First Street are below one hundred.

Q. So that you expected, did you, to find No. 72 in the first block of the street?

A. Yes, sir.

Q. Did you notice at the time you delivered this message the number of the house in which you delivered it?

A. No, sir.

Q. Did you afterwards discover what that number was?

A. Yes, sir.

Q. When did you discover that?

A. When I went down there.

32 Q. With whom?

A. With Mr. Callum.

Q. How long after January 22, 1908, was it that you went down there with Mr. Callum?

A. I couldn't tell you that.

Q. Was it within a few days, or was it more than a month?

A. More than a month.

Q. For what purpose did you go down there then?

A. To find out which house I delivered the message to.

Q. That is, to show Mr. Callum?

A. Yes, sir.

Q. Did you show Mr. Callum, then, at what house you had delivered the message?

A. Yes, sir.

Cross-examination.

By Mr. GRACE:

Q. What house did you show Mr. Callum?

A. I showed Mr. Callum the house to which I delivered the telegram.

Q. Did you find anybody living in the house at that time?

A. No, sir.

Q. Did you go in and ask?

A. No, sir; we rang the bell and nobody came. The person living next door told us they had left—moved.

Q. And did you ever find No. 72 Canal Street?

A. Yes, sir.

Q. What block is No. 72 Canal Street on?

A. It is between Delaware Avenue and D Street.

Q. Is it on the same block as No. 12 at all?

A. It was on the same block; but between two different squares.

Q. In other words, it was not between the same two streets as No. 12 was?

A. No, sir.

Q. It was not?

A. No, sir.

33 Q. How long now was it, after this, that you went back to this place?

A. Couple of months after that.

Q. Couple of months?

A. Yes, sir.

Q. Was it after suit had been filed?

Mr. STARK: That is objected to, unless it is shown that the witness knew when suit had been filed.

Question not answered.

Q. Were you working with the company at the time you went back there with Mr. Callum?

A. No, sir.

Q. You had left the company?

A. I had left the company.

Q. Do you know when suit was filed?

A. No, sir.

Q. Did Mr. Callum tell you, when you went back there, that they were having trouble about this message?

A. Yes, sir.

Q. He told you that?

A. Yes, sir.

Q. He told you the person to whom the message was sent had never received it, and there was a complaint made about it?

A. Yes, sir.

Q. When did you leave the company?

A. About two weeks after the message was delivered.

Q. Let us see if you can fix in your mind when it was you went back?

A. When I went back to point out the house to him?

Q. Yes.

A. I couldn't state that.

Q. Well, it was before the 17th day of April, wasn't it; that is, it was not three months after——

A. (Interrupting). No, sir.

Q. It was—how long do you suppose it was?

A. About two months, I guess.

Q. And you went back with Mr. Callum?

34 A. Yes, sir.

Q. What did Mr. Callum tell you about the message?

A. He told me—he asked me if I recognized this sheet, and I told him yes; and he asked me to which house I delivered it—if I delivered it to 72 or some other number.

Q. And you told him you delivered it at No. 12?

A. I told him I didn't know; so we got on the car and went down there, and we found the house.

Q. Found No. 12?

A. Yes, sir.

Q. Found you delivered it at No. 12?

A. Yes, sir.

Q. You didn't know when you delivered it what was the number of the house, did you?

A. No, sir.

Q. You delivered it, in fact, to the first house the dog ran you into—is that the idea?

A. Yes, sir.

Q. Very fortunate that the dog knew where the house was, wasn't it?

A. He didn't run me, but he was in the next yard, and I wasn't going in there where the dog was.

Q. Did you see the dog when you went back with Mr. Callum?

A. No, sir; I was not looking for it.

Redirect examination.

By Mr. STARK:

Q. Just one thing I forgot to ask you, Mr. Mastin. What time did you turn that delivery sheet in to the delivery clerk when you went back to the office?

A. Quarter to four.

Q. Did you go straight back to the office from Canal Street?

A. Yes, sir.

35 Whereupon, ROBERT G. CALLUM, a witness presented on behalf of the defendant, being first cautioned and sworn to tell the whole truth, deposes and testifies as follows:

Direct examination.

By Mr. STARK:

Q. Mr. Callum, what is your name, age, residence and occupation?

A. Robert G. Callum; fifty-four years of age; residence, 1723 De Sales Street, Washington, D. C.; occupation, supervision of the messenger service of the Mutual District Messenger Company, which performs services for the Western Union Telegraph Company.

Q. Were you in that position and occupation on the 22d day of January, 1908?

A. I was.

Q. And have you been ever since?

A. I have.

Q. What, if anything, do you know about the attempts to deliver this message, dated Summerville, South Carolina, January 22, 1908, and addressed 72 Canal Street, South, Washington?

Mr. GRACE: Of your own knowledge, Mr. Callum.

A. When complaint was made of the non-receipt of the telegram the case was given to me for investigation, and I obtained the boy, who was then out of our service——

Mr. GRACE: (Interrupting). We object to this. This is clearly irrelevant; that is to say, information found out only after complaint

was made of non-delivery cannot be anything but hearsay as to the actual fact of the delivery or non-delivery of the telegram at the time.

A. (Continued): After the boy came to our office I made inquiry of him as to his services in connection with the delivery; and his services having been correct in all other——

36 Mr. GRACE: (Interrupting). We object.

Mr. STARK: Say what you did.

A. (Continued). His service was correct as to the delivery of the other five telegrams———

Mr. GRACE: (Interrupting). We object to that.

Q. Let us begin all over again. Did you have any conversation with the messenger boy, Samuel Mastin, with reference to his attempts to deliver that message?

A. I did.

Q. As the result of that inquiry, did you go anywhere with Mastin?

A. I did.

Q. Where did you go?

A. I went to Canal Street.

Q. To Canal Street in the City of Washington?

A. Yes, sir.

Q. Is that Southwest? Explain what you mean by Southwest in that connection.

A. It is a street between South Capitol Street and First Street, Southwest.

Q. Is the City of Washington divided into four quarters?

A. It is.

Q. Where are these quarters?

A. South Capitol Street——

Mr. STARK (interrupting): No, no.

A. (continued). Northeast, northwest, southeast and southwest.

Q. Where is the junction point of these four quarters—where is the center of the city?

A. Well, southwest is between South Capitol Street and B Street, Southwest.

Q. Is there a Canal Street in the Southwest section of the city.

A. There is.

Q. Is there a Canal Street in the Northwest section?

A. There is not.

37 Q. So that the Southwest section is the only section, is it, of the city in which there is a Canal Street?

A. I made a mistake. There is a Canal Street, Northwest.

Q. But is there or not any Canal Street, Southeast?

A There is no Canal Street in the Southeast.

Q. So that when a message is received in Washington, addressed to Canal Street, South, that can mean only Southwest?

A. Only Southwest; yes, sir.

Q. Can you state where you went?

A. I went with the messenger to Canal Street, Southwest; and allowed the messenger to take me to the place where he said he delivered the telegram—the house.

Q. Where was that place?

A. That was No. 12 Canal Street, Southwest

Q. On what block on Canal Street, counting from the beginning of the street, was that house?

A. It was on the first block from South Capitol Street—between South Capitol and Delaware Avenue, on Canal Street.

Mr. GRACE: We simply object to all this testimony, inasmuch as it is hearsay as to the point of whether or not the messenger boy delivered the message at any house. It is based on the fact that the messenger boy told him that at a certain house he delivered this message, and certainly cannot corroborate the fact that the messenger boy delivered it at that house.

Mr. STARK: I offer the testimony, not for the purpose of showing that the messenger, in fact, delivered the message at any particular house, but for the purpose of showing that, assuming the truth of the messenger's testimony, that he delivered the message at No. 12 Canal Street, and that the house No. 12 Canal Street was in a particular location.

Mr. GRACE: We object to that as irrelevant.

Q. Was there any No. 72 on that block?

A. There was not.

38 Q. Was there a No 72 on Canal Street at all?

A. There was a No. 72 on Canal Street.

Q. Where was it?

A. Between Delaware Avenue and D Street.

Q. Was there anything in the local situation that you observed, at the time you made your visit, which might readily have confused a messenger boy?

Mr. GRACE: We object to that That is a matter of opinion in the first place.

A. There was.

Mr. GRACE: We object to that, on the ground that it is simply the opinion of this witness, and that it is irrelevant.

Q. Now, what was it?

A. The direction in which the boy approached Canal Street, and the short squares of these streets cutting through at that particular point.

Mr. GRACE: We object to that. He says the direction in which the boy approached Canal Street. (To the witness): You mean at the time you went with him?

A. Yes. There is great deal about the location that would be confusing to a messenger?

(Mr. STARK:)

Q. What?

A. The short blocks; streets cutting through them with only the space of a limited number of buildings between each block; and the scattering houses on one or more of the blocks; and the general appearances and conditions around the surroundings.

Q. What is the character of the surroundings?

A. Well, it is that of a poor order of people—respectable people—live in that locality?

Q. Are they colored people?

A. Mostly so; I think.

39 Q. What is the custom, if any, in the City of Washington with reference to the numbering of houses including the numbers from one to one hundred on any street?

A. It usually begins with one hundred on any particular block, and one to a hundred houses on a block.

Q. That is to say, at the beginning of a street, between the beginning of the street and the first street corner after the beginning; is it or is it not the custom to have the numbers from one to one hundred on that block?

A. Yes, sir.

Cross-examination.

By Mr. GRACE:

Q. Is there a number on No. 12?

A. Yes, sir.

Q. What is it?

A. No. 12.

Q. Was it visible—plainly visible?

A. I think so; it was to me.

Q. There was a big number on No. 72, wasn't there?

A. No, sir; not a very large number, I don't think—not much larger than there is on No. 12.

Q. Don't you recall that 72 is rather large—the number on 72?

A. 72 I think is on the door, and the other number is on the transom. One is metal letters and the other is painted.

Q. So that the boy couldn't have been mistaken as to number 12, then?

A. I don't think so.

Q. Now, Mr. Callum, the boy then knew positively, by consulting the number, that he was at No. 12?

Mr. STARK: I object to that as calling for a conclusion.

A. He ought to have known it; yes, sir

Q. Well, did the boy tell you at that time that that was the house the dog chased him into?

40 A. I think he did.

Q. That was a very marvelous coincidence; don't you think?

A. No; I should think there are plenty of dogs in that locality down there.

Q. This dog was in 16?

A. Yes; but they are all one-story buildings, and all in one row, and you would say that the six or seven buildings were all built at one time—they are all on the same side of the street, and there is a parking between the pavement and the houses

Q. And so the boy told you that the dog chased him into No. 12?

A. I think the boy said that there was a dog in front of No. 16, and he went into No. 12.

Q. Through the agency of the dog?

A. Well, I don't think so; but he thought he could get the information from No. 12 that he was seeking.

Redirect examination.

By Mr. STARK:

Q. As a matter of fact did the boy ever tell you that he was ever chased by a dog?

Mr. GRACE: One minute—you can't contradict your own witness.

A. No, sir; I don't think so.

Q. Did anybody ever suggest that the boy was chased by a dog except counsel for plaintiffs in his cross-examination of you?

A I think that is the only time I ever heard it.

Recross-examination.

By Mr. GRACE:

Q. You heard the boy on the stand a little while ago?

A. I don't think he said he was chased by a dog, sir. My impression is that he saw a dog, and he preferred to go into No. 12 instead of the place the dog was in front of.

41 Redirect examination.

By Mr. STARK:

Q. What is a messenger boy's duty, according to the instructions he receives from the delivery clerk, when he can't find the particular number to which a message is addressed?

A. He is instructed to make the best effort he can to find the party to whom the telegram is addressed, and if they are not at the specific address given he is to try other places in the neighborhood, and notify the office that the party is not at that address, but resides at such other place; and it is frequently the case that a messenger may go to one place with a telegram, and the party is not there; and he tries at some other address and asks if it belongs there; and if it is claimed it does, the message is delivered there.

Q. Suppose he can't find the number, or there is no such number?

A. Then it is his duty, according to instructions, to make the best effort he can to deliver the telegram by making inquiries for the addressee in that neighborhood.

Q. Is it at all unusual for a message to be received with an error in the number——

Mr. GRACE (interrupting): We object to all that. This message was properly addressed.

Q. (continued). —and for the messenger who has the message in charge to make inquiries in the neighborhood and find that the addressee is in fact at another number—is that at all unusual?

Mr. GRACE: I object to that as being irrelevant. There is no such contention in this case. This is a case where a telegram plainly addressed was improperly delivered.

A. It is not at all unusual; it is frequently the case.

42 Recross-examination.

By Mr. GRACE:

Q. Mr. Callum, I forgot to ask you: When did you go down there with this messenger boy?
A. I think it was sometime about the month of March.
Q. After this suit was filed?
A. I think so.
Q. That was what brought it to your attention—the filing of the suit—was it not?
A. The investigation of the services was brought to my attention.
Q. Complaint had been made?
A. Yes, sir.
Q. It was before, then, the company put in its answer in this case?
A. I don't know anything about that at all.

Mr. GRACE: It must have been.

Redirect examination.

By Mr. STARK:

Q. I hand you a statement made by you under date of December 21, 1908, and ask you if that is your handwriting?
A. It is; yes, sir.
Q. After refreshing your recollection with that statement I ask you if you can now remember about when you and the boy first went to look over the ground?

Mr. GRACE: Let me see that.
Mr. STARK: No, I will not. I am not offering that in evidence.
Mr. GRACE: In the first place, I don't believe the witness can refresh his recollection in this way.

Q. Have you any better recollection now?
A. No, sir.

Mr. STARK: That is all.

43 Whereupon, WILLIAM W. MILLAN, a witness presented on behalf of the defendant, being first cautioned and sworn to tell the whole truth, deposes and testifies as follows:

Direct examination.

By Mr. STARK:

Q. Mr. Millan, you may state your name, age and residence?
A. William W. Millan; over forty years of age; residence, Washington, D. C.
Q. What is your profession?
A. I am a lawyer.
Q. How long have you been a lawyer?
A. Almost nineteen years.
Q. And are you or are you not a practicing attorney and counsellor at law in all the Courts of the District of Columbia?
A. Yes, sir; I am.
Q. Does that include the Supreme Court of the United States?
A. It does.
Q. And the Court of Appeals of the District of Columbia?
A. Yes, sir.
Q. The Court of Appeals of the District of Columbia is the highest court, is it, for ordinary purposes, in the District of Columbia?
A. It is.
Q. Are you familiar with the law in force now, and which was in force on January 22, 1908, in the District of Columbia as to the right to recover compensatory damages for mental auguish in a civil action?
A. I think I am, sir; reasonably so.
Q. Under the law which was in force in the District of Columbia, on the 22d of January, 1908, and which is still in force there, could there be a recovery of compensatory damages for mental anguish unaccompanied by physical injury, in an action for breach
44 of contract, other than breach of a promise to marry, or in an action founded on negligent tort?
A. There could not have been.
Q. Was there, on January 22, 1908, or has there been at any time since then, any statutory modification of the common law in force in the District of Columbia on the subject of the recovery of damages for mental anguish?
A. There was and has been none.
Q. So that, if I understand you, the law which at present controls that subject in the District of Columbia, and which did control that subject on January 22, 1908, is the common law of England, as construed by the Court of the District of Columbia?
A. That is correct, sir.
Q. Are you familiar with the law of the District of Columbia as it was on January 22, 1908, and as it is now, with reference to the right to recover punitive damages against a master, whether that master be a corporation or an individual, for the wilfull, wanton, and reckless tort of a servant?

A. I think I am, sir; as that law has been declared by our Court of Appeals.

Q. On the 22d day of January, 1908, according to the law then in force in the District of Columbia, and still in force; under what circumstances, if any, could a recovery of punitive damages be had against a master, whether a corporation or an individual, for the wilfull, wanton or reckless tort of a servant?

A. The law on the subject was declared by the Court of Appeals, in the case of Woodward vs. Ragland, 5 Appeals, D. C., 220, and, generally speaking, is this: punitive damages can only be recovered under such circumstances as indicated in the question when the latter counsels, participates in or ratifies the tort actively. Perhaps I had better give that decision in the language itself if — am permitted to refer to it.

Q. Please do so.

WITNESS: As this case is still the recognized law, and has not been questioned or overruled.

Q. Please do so.

45 A. This is the syllabus, which is sustained by the decision itself, and by the authorities cited, notably, the case of Lake Shore Michigan Southern Railroad Company vs. Prentice, 147 U. S., 107: "Punitive damages cannot be assessed against the principal unless he participated in the wrongful act, or expressly or impliedly authorized or ratified it."

Q. And that means, does it, personally participated, or personally ratified?

A. According to the decision in this case; yes, sir. The case was reversed on that point, and went back for a new trial.

Q. I am now going to ask Mr. Millan one more question; a hypothetical question embracing the facts in this case, as I understand them. Assume, Mr. Millan, if you please, that a contract is entered into at Summerville, South Carolina, between an individual and a telegraph company, whereby the telegraph company, in the ordinary course of its business, agrees for a consideration to transmit and deliver to another person, at No. 72 Canal Street, S. W., Washington, D. C., a message substantially in the following language: "Come at once. Your sister died this morning." Assume that the telegraph company does in fact promptly transmit that message, without material change, from Summerville, South Carolina, to its office in the City of Washington, D. C.; that it is thereupon promptly placed in an envelope, properly addressed, and given to a messenger, who is instructed to deliver it to the addressee at 72 Canal Street, N. W. Assume that the messenger takes the message so enveloped and addressed to Canal Street, S. W., to the block on which, according to the custom with reference to the numbering of houses in the City of Washington, No. 72 Canal Street, S. W. would naturally be located. Assume that there is no number 72 on that block; that the messenger, after looking for No. 72 and failing to find it, goes to number 12 Canal Street, S. W., on the said block, and rings the door bell; that the door is opened by a colored woman; that the messenger shows her the message envelope and inquires for the addressee; that

the colored woman informs the messenger that the addressee
46 lives there; that thereupon the messenger delivers the message to her and she receipts for it; and he returns to the telegraph office and turns in his delivery sheet thus signed by the colored woman to the delivery clerk. Assume further that there is in fact a No. 72 Canal Street, S. W., in the City of Washington, but that it is on another block; that the addressee did in fact reside at No. 72 Canal Street, S. W.; that the addressee, in fact, never received the message; and that as the proximate result of not receiving the message the addressee or her husband, or both, failed to be present at the funeral of the addressee's sister; but neither the addressee nor her husband, nor both jointly, sustained any other actual damage. In your opinion, under the law of the District of Columbia, as it is now and was on January 22, 1908, is there any form of civil action in which, under those facts, the addressee or her husband, or both, would be entitled to recover anything except nominal damages from the telegraph company for its default or breach of duty, if any, in regard to this message?

Mr. GRACE: We object to that question, first, because I don't think, as a hypothetical question, it is confined strictly to the testimony—it begs the question by a very skillful manipulating of the testimony, so as to mean not quite, in some respects, what I believe the testimony means, and therefore is not responsive, in the first place, as a hypothetical question to the testimony; second, we renew our objection that we made in the beginning, and which we had better make in the testimony of Mr. Millan—we had better consider that this objection is being made throughout—as to the irrelevancy of this testimony at all, thereby objecting now and at the other time to the irrelevancy of this testimony on the ground that no matter what cause of action might or might not exist in the Disrict of Columbia, assuming the facts stated to be responsive to the facts in this case, it is irrelevant in this cause of action, as we take the position that the law of the District of Columbia on the subject has
nothing to do with this cause of action. We want to renew
47 that here, and we want to consider all this testimony taken under that objection.

Mr. STARK: That is understood.

Mr. GRACE: Then I want to object on the ground that the hypothetical question does not respond, in my opinion, to the testimony.

A. There is not.

Cross-examination.

By Mr. GRACE:

Q. Now, Mr. Millan, I understood you to say in the beginning of your testimony that you could not recover in the District of Columbia for mental anguish, unaccompanied by physical suffering—physical injury—except in cases of breach of promise?

A. And libel and slander cases.

Q. And add libel and slander now?

A. Yes; they are a distinct branch of the law.

Q. My question was for a negligent tort. It is a question whether this is for breach of contract or an action ex delicto. Do you know whether or not there is any case in the District of Columbia specifically deciding what you say?

A. Yes, sir.

Q. What is that case?

A. That is, that there can be no recovery for mental anguish not coupled with physical injury—a case of a negligent tort. The two cases of Smith vs. Davis and Smith vs. Cissell, reported in 22 Appeals, D. C., one at page 300 and the other at page 318, which grew out of the same accident——

Q. Was that a case of negligent tort?

(Interrupting.)

A. —the plaintiff in error being the same in both cases, decide this point specifically. I cite the two cases together, because the Cissell decision, which is a brief one, and the one in which
48 the charge on this particular point occurs, refers to the other case for the facts.

Q. Was that a case of negligent tort?

A. Yes, sir; it is. I did not quite complete my answer. There is another case which I think establishes the principle, not so directly as the two that I have mentioned. That is the case of Railway Company vs. Dashiell, 7 Appeals, D. C., 507.

Q. Now then, I ask you, do these cases refer to negligent tort?

A. They do, as I understood the question to relate to that class of action.

Q. Does that principle extend to breach of contract?

A. I think it does; yes, sir. Our Court of Appeals said, in Western Union Telegraph Company vs. Ferero, 9 Appeals, D. C., 455, that the rule was the same on the subject of damages, whether the action was for breach of contract of for tort. I should qualify my answer at that point by saying that they were not dealing with any question of mental anguish there; it was simply a declaration giving a principle as to forms of action.

Q. That case simply holds, then, that the rule—the general rule of law governs actions for breach of contract, and actions for negligent tort—is that the point?

A. What they said was this: "Wherever, then, an action sounds in tort for negligence in the performance of a duty—." —passing over certain intervening words—"and is as in this case, founded on a contract which raised the duty, though that contract was made with another person, the measure of damages must be regardad as practically the same as if the action were for the breach of a contract under the same circumstances."

Q. So that you are prepared to state as a conclusion of law, that regardless of whether or not an action is for a breach of contract or a tort, no damages could be recovered in this jurisdiction for mental anguish unaccompanied by any other element of damage?

A. I am prepared to so state, remembering that "tort" is limited,

as indicated in the previous question and answers. It does not include libel and slander.

49 Mr. GRACE: Yes; I understand that.

WITNESS: Assault and battery, or anything like that—that is different.

Q. And these two Smith cases are the ones on which you found that statement?

A. Not wholly, sir. In the Smith and Cissell cases it is so decided, and the principle is, I think, also established in the Dashiell case; and there are a number of cases in the Supreme Court of the United States, which have gone up, for the most part, from this District, that by strong implication sustain that conclusion; though I do not find that the point has been expressly decided.

Q. Your position, then, finally resolves itself into the Smith and Dashiell cases?

A. So far as the actual decision of the point is concerned. The other cases only inferentially sustain my conclusion.

Q. Now, about the second proposition—the element of punitive damages. You base your conclusion on that case of Woodward vs. Ragland, don't you?

A. Yes, and the cases there cited, including particularly the case of the Lake Shore Railroad.

Q. Was the case of the Lake Shore and Michigan Central Railroad a District of Columbia case?

A. It was not.

Q. So that is simply a citation of a case of another jurisdiction?

A. Not quite that, I think, Mr. Grace. In our jurisdiction, which is different from the States, whenever we fail to find a point decided in our Court of Appeals, we go next to the Supreme Court of the United States for authority; even though that decision is based on a case coming from another State; and then we examine to see whether in the decision of that case any element peculiar to the laws of the State from which it comes is involved, or whether it is a decision based on the common law; and the Lake Shore and Michigan case does not seem to involve any particular point peculiar to the laws or decisions of Michigan; but to be a common law decision.

Q. That case arose in the State of Michigan?

50 A. I am not quite—I think it was Michigan; but whatever State it was, the purport of my answer was that it is a common law decision, and not based upon any peculiarity of the laws or decisions of any State.

Q. Now, then, do you know whether or not that principle is intended to apply to cases in which the master is a corporation?

A. I should say yes, because in the case last referred to——

Q. (Interrupting.) The Lake Shore and Michigan Central case?

A. Yes. That was a corporation master. Of course in the local case—the Woodward and Ragland case—that was not a corporation.

Q. Do you know whether or not it has ever been decided in this District whether or not, when the master is a corporation, in order to recover punitive damages there must be traced to the master—

the act complained of must be traced to the master, or must have been ratified by him?

A. You mean, I assume, traced to the master in the way I have indicated in my previous answers?

Q. Yes, sir.

A. I don't think I can cite you any case in which that has been decided.

Q. So that it is still an open question, except as it may be governed by this dictum in the Woodward and Michigan Central Railroad cases—this obiter?

A. No, I don't say that.

Q. It was not specifically involved in that case?

A. Oh no, but I think it is settled by the Supreme Court of the United States in this railroad case we have just been talking about, and the other cases there cited. I have already pointed out to you that in my opinion this is a case that rests on the common law as construed by that Court.

Q. I know; but that case was never settled in this jurisdiction. You mean that it would probably be settled that way if a case should arise in this jurisdiction?

A. Undoubtedly.

51 Q. How can a corporation act—how alone must a corporation act—except through its agents?

A. Well, I don't know of any other way in which it could act apart from its agents.

Q. How, then, could the wrongful act of an agent of the corporation, acting within the scope of his authority, be ratified or authorized?

A. I should say that that is a matter of argument to be determined from a general investigation of the law, and that there is nothing peculiar in the laws of the District of Columbia, upon that proposition, which would make it necessary or expedient for me to give a more specific answer, unless it is insisted upon.

Q. No; I won't insist. Well, there is only one more question. Mr. Stark asked you a question which assumed to embody the facts in this case. Assuming that that does not embody the facts in this case, but that this messenger boy, acting within the scope of his authority, wilfully and wantonly failed to deliver this telegram, would you say that even in that case there could be no recovery for punitive compensatory damages?

Mr. STARK: I object to that question; first, on that ground that it is not proper cross-examination in view of the fact that I have not asked the witness anything on direct in regard to the law of the District of Columbia on that subject. In the second place, I object to it as not founded on any facts proved or which will be proved in this case, inasmuch as there is in this case no evidence, and will be no evidence, of any wilfulness or wantonness on the part of the messenger, or by any other agent or servant of the defendant.

A. I cannot find that that question has been raised or decided in this District, either in a local case or by the Supreme Court of the United States.

Mr. GRACE: That is all.

Redirect examination.

By Mr. STARK:

Q. Now, Mr. Millan, is there under the laws and practice
52 of the District of Columbia an appeal to the Supreme Court of the United States in certain cases?

A. There is; yes, sir.

Q. And are the decisions of the Supreme Court of the United States, when they are not founded on any peculiar rule of law in force in some other State or Territory, or jurisdiction, but are founded solely on the common law, regarded as binding precedents in the Courts of the District of Columbia?

A. They are; I thought I had already so stated.

Q. Is the case of Lake Shore and Michigan Southern Railway vs. Prentice, 147 U. S., 107, law in the District of Columbia, and binding on the Courts of the District of Columbia; and if you cannot answer that question without again refreshing your recollection, I ask you to refresh your recollection by reading at the top of page 229, in the case of Woodward vs. Ragland, to which you have referred, in 5th Appeals Cases, District of Columbia?

A. I am perfectly familiar with that—looked at it a few minutes ago; and the Court says, in substance, that the law in this District has been decided by the Supreme Court of the United States; referring to this case that you have mentioned.

Q. Are you aware of any statute or judicial decision, either in the District of Columbia or in any other jurisdiction, in which it has ever been suggested that a distinction is to be drawn with reference to the liability for punitive damages in an action of tort between a corporation master and an individual or partnership master?

A. I have never heard of any. I made quite a careful examination of that subject.

Q. To the best of your knowledge and belief as a practicing attorney in the District of Columbia and one familiar with its law, is any such distinction recognized or would any such distinction be recognized by the Courts of the District of Columbia?

A. I should say no. Do you want me to give my reasons?

Q. Yes; please?

A. From the fact that the Court of Appeals, in dealing with a case where the party involved was an individual master, re-
53 ferred to the Lake Shore and Michigan case, where the party involved was a corporation master, and said in specific terms that the law on the subject of punitive damages in this District has been settled by this case; meaning the case of the corporation master.

Q. I suggest that, if convenient, if you think it proper, it might be well if you made a part of your testimony the paragraph to which you have just referred in the Woodward case. It is not very long, and makes your meaning a little more clear.

A. I quote from the opinion in Woodward vs. Ragland, beginning at the top of page 229 of the report, and continuing to the end of the first paragraph. (Reading.) "The law in this District upon the subject of punitive damages is very clearly stated by Mr. Justice

Gray in Lake Shore and Michigan Southern Railway Company vs. Prentice, 147 U. S., 107, as follows: 'In this Court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injuries, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary damages.' Citing the Amiable Nancy, 3 Wheaton, 546, 558, 559, and seven other cases decided subsequently thereto by the Supreme Court of the United States."

Q. As a matter of fact, in this case of the Amiable Nancy, 3 Wheaton, 546, which is also referred to by the Court under the paragraph which you have quoted, was the master an individual in this case?

A. I don't know. This is an admiralty case——

Mr. GRACE (interrupting): Do you know that of your own knowledge?

A. I find by refreshing my memory, after reference to the report, that the case of the Amiable Nancy was not a case of a corporation master. I see no reason for modifying my answer in any particular,
except to state this fact. I am rather strengthened in my
54 conclusion than otherwise from the fact that our Court, in
the citation of authorities in the Woodward case, blends these two classes of cases and makes no distinction between them. My attention is now called to the case of Redwood vs. Metropolitan Railway Company, 6 D. C., 302.

Mr. GRACE: Let me ask you; is that decision binding on your present Court of last resort?

A. No.

Mr. GRACE: Well, then, I do not consider that an authority.

WITNESS: This is a decision of what is known, or was formerly known, as the Supreme Court of the District of Columbia, in General Term; which, until the establishment of the Court of Appeals, in 1893, was our Appellate Court—the Court of highest jurisdiction next to the Supreme Court of the United States. That was a case of a corporation master, and the Court said: "The law will not allow exemplary damages to be inflicted on a principal for the act of his agent unless it is shown that the principal was derelict in connection with the offense of the agent." I may add that the decisions of the Supreme Court of the District of Columbia, in General Term, are not regarded as binding by the Court of Appeals since its establishment; but are recognized as of high authority.

Q. As high authority?

A. As of high authority.

Q. What is the date of that case?

A. That was decided more than forty years ago—October 30, 1868.

Q. I call your attention to the fact that the case of Redwood vs. Metropolitan Railway Company, to which you have just referred,

is cited in the American & English Encyclopedia of Law as representing the law of the District of Columbia on the question, and ask you whether in view of that fact you have anything to say as to whether in your opinion the Metropolitan Railroad case is still the law of the District of Columbia or not, at the present time?

A. Well, it has never been questioned or overruled.

55 Recross-examination.

By Mr. GRACE:

Q. In your opinion is that decision, which is not binding to-day on the Court of last resort of the District of Columbia, such a decision as gains eminence by the fact that it is cited in the American & English Encyclopedia of Law?

A. No; I don't attach any importance to its weight or eminence by its being cited there; but it does indicate to me that in the opinion of the digester, at least, it has not been overruled or questioned; but I don't rely upon this opinion for that, but upon my own knowledge.

Q. Do you think there is any authority in the world that can lend weight to the decisions of an inferior court, except the decisions of its own superior court?

A. Answering your question categorically, I would say no; but that is not the case here, because this is the decision of a court which, at the time it was rendered, was the Court of highest resort in this District, barring, of course, the Supreme Court of the United States in certain cases.

Q. But it is not now?

A. Since the establishment of the Court of Appeals the rule that I have indicated prevails.

Q. Don't you think that that is all the law editor on that particular subject in the American and English Encyclopedia meant it to be?

A. I think that he meant to do just what I am trying to do in this action—give about all the law on the subject. I want it to be understood that the fact that I have predicated my answer upon the Woodward case and the Lake Shore case is not to be obscured by this lengthy discussion in regard to a minor case.

Q. Now, one question more I want to ask you. Take it all and all, can you say——

WITNESS (interrupting): I should add this further fact, that the decisions of the General Term are recognized as the settled law of this District and binding upon our trial courts, until actually reversed by the Court of Appeals itself.

56 Mr. GRACE: I understand that they are superior to the inferior courts, and inferior to the superior courts.

Q. Now, sir; taking it all and all, can you say that the Woodward case, except as a matter of obiter, establishes the law that you cannot recover punitive damages in cases where the master is a corporation, under the circumstances previously described?

A. I cannot answer that question categorically. I would say that, taking the Woodward case with its own facts, and the fact that the

Court says that the law on the particular point under discussion, in this District has been settled in the Lake Shore case previously referred to, I have no hesitancy in saying that the Woodward case is authority for the answers I have heretofore given.

Q. Do you consider that point one which necessarily arose in the decision of that case?

A. Of course not; that is apparent on the face of it.

Q. It would guide, but you would not care to say that it would bind this Court in its future decisions?

A. Taking the whole situation together, I should say it was binding, because it did necessarily arise in the Lake Shore case.

Q. In other words, you fall back finally to the Supreme Court of the United States. The Woodward case, as I understand it—unless you could absolutely prove that the United States decisions bind your courts, the Woodward case would not bind in a future case where the exact point was raised.

Question not answered.

Mr. STARK: Do you consider the Lake Shore case binding on the Courts of the District of Columbia?

A. I certainly do.

Deposition of TRACY L. JEFFORES, read to the jury as follows:

Direct examination.

By Mr. STARK:

Q. Mr. Jeffords, will you state your name, age and residence?

57 A. Tracy L. Jeffords; forty-seven years; resident of Jefferson County, West Virginia; practice law in the District of Columbia.

Q. What is your profession?

A. I practice law in the District of Columbia and my own State.

Q. How long have you been practicing law in the District of Columbia?

A. Seventeen years.

Q. And are you or not admitted and qualified to practice in all the courts of the District of Columbia, including its highest Court?

A. Yes, sir; I am; and for the last dozen years I have had one or more cases in the United States Supreme Court about all the time.

Q. What is the highest Court in the District of Columbia?

A. The highest Court in the District of Columbia is the United States Supreme Court.

Q. Are cases which originate in the District of Columbia, under your practice here, carried by appeal or writ of error ultimately to the Supreme Court of the United States?

A. They may be, if in civil cases they involve more than five thousand dollars.

Q. What is the rule in other cases, that is, cases which do not involve five thousand dollars or over?

A. In such cases, with some exceptions, the Court of Appeals of the District of Columbia is final.

Q. What is the purpose of making the determination of the Court of Appeals of the District of Columbia a final determination in certain classes of cases?

A. To keep those cases from going to the United States Supreme Court, and, of course, to keep from clogging that docket by bringing too many cases there.

Q. Can you explain a little more fully, Mr. Jeffords?

A. Under the law at one time, cases involving more than a thousand dollars, which originated in the District of Columbia, might go to the United States Supreme Court. Later that
58 amount was raised, and in 1893 the Court of Appeals was established for the District of Columbia, in analogy to the United States Circuit Courts of Appeal, and such legislation was had as to prevent cases which before that time might have been taken to the United States Supreme Court from going there, and made the final determination of such cases rest with the Court of Appeals of the District of Columbia.

Q. And the purpose of that was what?

A. For the relief of the United States Supreme Court.

Q. Are the decisions of the Supreme Court of the United States binding on the courts of the District of Columbia without reference to the question whether those decisions were rendered in cases which originated in the District of Columbia or cases which originated in other jurisdictions?

A. They are binding and controlling.

Q. You except, I assume, cases which go up to the United States Supreme Court from other States and which involved any principle of law peculiar to the State of their origin?

A. Those are excepted, because they have no application to the District of Columbia.

Q. But in cases involving general principles of law, and not any principle of law peculiar to some foreign State or jurisdiction, I understand you to say that the decisions of the Supreme Court of the United States are always binding on the courts of the District?

A. That is the fact.

Q. Are you familiar with the law of the District of Columbia as it was on January 22, 1908, and as it is now, with reference to the right to recover punitive damages against a master, whether that master be a corporation or an individual, for the wilful, wanton and reckless tort of a servant?

A. Yes, sir; I think so.

Q. On the 22d day of January, 1908, according to the law then in force in the District of Columbia, and still in force, under what circumstances, if any, could a recovery of punitive damages be had against a master, whether a corporation or an individual, for the wilful, wanton and reckless tort of a servant?

59 A. Only when he participated in the wrongful act, or expressly or impliedly authorized or ratified it.

Q. Are there any authorities on that point which are binding on the courts of the District?

A. In my last answer I was reading from the opinion of the Court in Lake Shore and Michigan Southern Railroad Company against Prentice, 147 U. S., 107, and that is binding on the courts of the District of Columbia, and is the law of the District of Columbia.

Q. Was that a decision of the Supreme Court of the United States?

A. It was.

Q. Was it a case which originated in the District of Columbia?

A. It was not.

Q. But was it a case involving any principle of law peculiar to any particular State or jurisdiction?

A. No.

Q. So that, if I understand you, it was directly within the class of cases in which you have already stated that the decisions of the Supreme Court of the United States are absolutely binding and controlling on the courts of the District of Columbia?

A. That is correct, and that is what I meant to say.

Q. Let me now ask you a hypothetical question, Mr. Jeffords. Assume that a contract is entered into at Summerville, South Carolina, between an individual and a telegraph company, whereby the telegraph company in the ordinary course of its business agrees for a consideration to transmit and deliver to another person, at No. 72 Canal Street, Southwest, Washington, D. C., a message substantially in the following language: "Come at once. Your sister died this morning." Assume that the telegraph company does in fact transmit that message, without material change, from Summerville, South Carolina, to its office in the City of Washington, D. C., that it is thereupon promptly placed in an envelope, properly addressed, and given to a messenger who is instructed to deliver it to the addressee at 72 Canal Street, S. W. Assume that the messenger, without the knowledge of his superiors, wilfully, wantonly
60 and recklessly fails to deliver the message to the addressee. Assume further that the addressee is in fact at No. 72 Canal Street, S. W., and that the addressee in fact never received the message, and that as the proximate result of not receiving the message the addressee or her husband, or both, failed to be present at the funeral of the addressee's sister, but neither the addressee nor her husband, nor both jointly, sustained any other actual damage. In your opinion, under the law of the District of Columbia as it is now, and as it was on January 22, 1908, is there any form of civil action in which, under those facts, the addressee or her husband, or both, would be entitled to recover anything beyond nominal damages from the telegraph company, the corporation master employing the messenger boy, for its default or breach of duty, if any, with regard to this message?

A. No.

Q. What is the reason why there could be no recovery of punitive damages on those facts?

A. Because under the law in the District of Columbia punitive damages cannot be recovered in such a case unless the master participated in the wrongful act, or expressly or impliedly au-

thorized or ratified it, and there is nothing in your hypothetical question to show that the principal participated in the wrongful act, or expressly or impliedly authorized or ratified it.

Q. Are you familiar with the law of the District of Columbia with reference to the right to recover compensatory damages for mental anguish in civil actions?

A. Yes, sir; I think so.

Q. What was the law of the District on that subject on January 22, 1908, and what is it now?

A. There can be no recovery of compensatory damages for mental anguish not accompanied by physical injury in an action for breach of contract unless it were breach of promise, or an action of negligent tort.

Q. Has there been at any time any statutory modification of the common law in force in the District of Columbia on the subject of the recovery of damages for mental anguish?

61 A. No.

Q. The prevailing rule on that subject is the common law rule; is it?

A. It is.

Q. With reference to the question as to the binding force of the decisions of the Supreme Court of the United States on the courts of the District of Columbia, even where those decisions were rendered in cases originating in other jurisdictions, do you care to suggest anything further by way of addition to the answers you have already given?

A. The decisions of the United States Supreme Court on cases coming from any jurisdiction, when they are not in relation to local conditions of that jurisdiction, are controlling upon the courts of the District of Columbia and are always recognized as such, and are not questioned. I have in mind the case referred to in this jurisdiction as the Bell-Morrison case, 1st Peters, which is controlling and recognized as such on the question of statute of limitations. This case came to the United States Supreme Court from the Circuit Court of the United States for the District of Kentucky.

Q. In Lake Shore and Michigan Southern Railroad against Prentice, to which you have already referred, was the master in that case, who was held not liable for punitive damages for the tort of a servant, an individual or a corporation?

A. A corporation.

Q. That is, it was the Lake Shore and Michigan Southern Railroad, was it?

A. Yes, sir.

Q. Do you know of any express recognition by the courts of the District of Columbia of the fact that that particular case, Lake Shore and Michigan Southern Railroad Company against Prentice, is binding here in the District?

A. In volume 5 of the reports of the Court of Appeals of the District of Columbia, at the top of page 229, in the case of Woodward against Ragland, the following appears in the opinion of the Court

in that case: "The law in this District upon the subject of
62 punitive damages is very clearly stated by Mr. Justice Gray in Lake Shore and Michigan Southern Railway Company against Prentice, 147 U. S., 107, as follows—." This is an express recognition by the Court of Appeals of the District of Columbia of the binding force of the Prentice case.

Deposition of WILLIAM W. MILLAN, read to the jury as follows:

Direct examination.

By Mr. STARK:

Q. Will you state your name, age, and residence?

A. William W. Millan; over forty years of age, and I reside in Washington, D. C.

Q. What is your profession?

A. Lawyer.

Q. How long have you been practicing law?

A. Twenty years.

Q. During all that time have you been admitted and qualified to practice in all the courts of the District of Columbia?

A. I have been admitted and qualified to practice in the Supreme Court of the District of Columbia during all of these years, that having been the highest court at the time of my admission. I have been a member of the Bar of the Court of Appeals of the District of Columbia since about the time of its organization in 1893, and of the Supreme Court of the United States for several years past.

Q. What is the highest court in the District of Columbia?

A. Generally speaking, we would say the Supreme Court of the United States, as that has appellate jurisdiction in all cases where the amount involved is above five thousand dollars. In cases where the amount involved is less than five thousand dollars, the Court of Appeals is the Court of last resort.

Q. On a previous occasion, Mr. Millan, you gave some testi-
63 mony in connection with this same litigation, and on that occasion you used this language: "In our jurisdiction, which is different from the States, whenever we fail to find a point decided in our Court of Appeals, we go next to the Supreme Court of the United States for authority; even though that decision is based on a case coming from another State; and then we examine to see whether in the decision of that case any element peculiar to the laws of the State from which it comes is involved, or whether it is a decision based on the common law." When you spoke of looking first among the decisions of your Court of Appeals, and next among the decisions of the Supreme Court of the United States, did you intend to imply that the decisions of the Court of Appeals were better as authority than the decisions of the Supreme Court of the United States, or did you intend simply to refer to the order in which, as a practical matter, you usually made your search for authorities?

A. I simply had reference to the order in which we would make the search as a practical matter. I had absolutely no intention of

suggesting or indicating that a decision of the Court of Appeals would be superior in authority to that of the Supreme Court of the United States, the decisions of the latter Court being absolutely binding in the District of Columbia.

Q. What is the law of the District of Columbia, and what was it on January 22, 1908, as to the recovery of punitive damages against a master, whether that master be a corporation or an individual, for the wilful, wanton or reckless tort of a servant? Let me first ask you whether you know what the law is and was on that date?

A. Yes, sir; I do.

Q. What was it, and is it?

A. The law was, and is, as I thought I had stated directly and positively in my former deposition, that there could be no recovery of punitive damages in a case in this District against a corporation master for a tort of its servant unless the principal participated in the wrongful act of the servant, or expressly or impliedly authorized or approved it. That law is fixed and settled, so far as the

64 District of Columbia is concerned, by the decision of the Supreme Court of the United States in the case of Lake Shore and Michigan Southern Railway Company vs. Prentice, 147 U. S., 101. From the statement of the case in the official report, it appears that it was an action of trespass on the case, and that the declaration alleged that the plaintiff was a physician; that on October 12, 1886, plaintiff, his wife, and a number of other persons were passengers holding excursion tickets on a regular passenger train of the defendant's railroad, from a point in Ohio to a point in Illinois; that during the journey the plaintiff purchased of several passengers their return tickets, which had nothing on them to show that they were not transferable; that the conductor of the train learning of this, and knowing that the plaintiff had been guilty of no offense for which he was liable to arrest, telegraphed for a police officer, an employee of the defendant, who boarded the train as it approached Chicago; that the conductor thereupon, in a loud and angry voice, pointed out the plaintiff to the officer and ordered his arrest; that the officer by direction of the conductor, without any warrant or authority of law, seized the plaintiff and rudely searched him for a weapon in the presence of other passengers, and hurried him into another car and there sat down by him as a watch, and refused to tell him the cause of his arrest; that while the plaintiff was being removed into the other car the conductor, for the purpose of disgracing and humiliating him with his fellow passengers, pointedly declared that he was under arrest, and sneeringly said to the defendant's wife, "Where is your doctor now?" That on arrival at Chicago the conductor refused to let the plaintiff assist his wife with her parcels in leaving the train—in other words, the facts alleged were abundantly ample to justify a finding of punitive damages if the case had been one where the master could have been liable for punitive damages under any circumstances. The trial Court charged the jury, among other things, as follows: "And further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured

feelings, you may add something by way of punitive damages against
the defendant, which is sometimes called smart money, if you
65 are satisfied that the conductor's conduct was illegal (and it
was illegal), wanton and oppressive. How much that shall be the Court cannot tell you." The jury returned a verdict for the plaintiff, and the case was taken by writ of error to the Supreme Court of the United States, and that Court, speaking through Mr. Justice Gray, said: "The only exceptions taken to the instructions at the trial which have been argued in this Court are those on the subject of punitive damages. The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor, of one of its trains, towards a passenger." The case was reversed and a new trial ordered on the sole ground that the master was not liable for punitive damages, and the Court further said, quoting from the case of Kenee vs. Lizardi, 8 Louisiana 2633: "It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially — for his acts, as the principal is responsible for the acts of his factor or agent." A large number of cases to the same effect is cited, and the Court then continues: "The rule has the same application to corporations as to individuals. This Court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent, as an individual is responsible under similar circumstances." (Citing numerous cases.)

"A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. (Citing several cases.) A corporation may even be held liable for a libel, or a malicious
prosecution, by its agent within the scope of his employment;
66 and the malice necessary to support either action, if proved
in the agent, may be imputed to the corporation. (Citing numerous cases.) But as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: 'The logical difficulties of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages.' Lothrop vs. Adams, 133 Mass., 471.

"Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In Detroit Daily Post Co. vs. McAr-

thur, in Eviston vs. Cramer, and in Haines vs. Schultz, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines vs. Schultz the Supreme Court of New Jersey said of punitive damages: 'The right to award them rests primarily upon the single ground—wrongful motive.' 'It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite.' 'Absence of all proof bearing on the essential question, to-wit: defendant's motive—cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine respondeat superior.' 50 N. J. L. 484. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and where it has been held that he can, it is admitted to be an anomaly in the criminal law. (Citing cases.)

"No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent
67 within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. (Citing cases.)

"Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. (Citing cases.)

"In the case at bar, the defendant's counsel having admitted in open court 'that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor,' the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

"But the Court, going beyond this, distinctly instructed the jury that 'after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings,' they might 'add something by way of punitive damages against the defendant, which is sometimes called smart money,' if they were 'satisfied that the conductor's conduct was illegal, wanton and oppressive.'

"The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents.

* * * * * * *

"In Denver & R. G. R. Co. vs. Harris, the railroad company, as

68 the record showed, by an armed force of several hundred men, acting at its agents and employees, and organized and commanded by its vice-president and assistant general manager, attacked with deadly weapons the agents and employees of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury 'were not limited to compensatory damages, but could give punitive or exemplary damages if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff.' This Court speaking by Mr. Justice Harlan, quoted and approved the rules laid down in Quigley's case, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610.

"The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of a train, or other subordinate or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce."

Q. You say that the case of Lake Shore and Michigan Southern Railroad against Prentice is the law in the District of Columbia today, and was on January 22, 1908?

A. Yes, sir.

69 Q. Has it ever been recognized as the law in the District by the District Court of Appeals?

A. In the case of Woodward against Ragland, 5 D. C. Appeals, to which reference has been made by the preceding witness and to which I also referred in my former deposition, the Court of Appeals expressly stated that the law on the subject of punitive damages in this district had been settled by the Supreme Court of the United States in the case referred to.

Q. And has that rule been modified in any way in the District?

A. It has not. I might add that there has never been any doubt in the mind of any member of this bar, so far as I am aware, and certainly not in the mind of any one who is posted as to the law, that the decisions of the Supreme Court of the United States in a common law case are absolutely binding upon the Court of Appeals, irrespective of the fact that the case comes from another State, and in the Lake Shore case above referred to the Supreme

Court of the United States was particular to say that it was a common law case, not based upon any peculiar principle of the law of any particular State, and that it was being decided according to the Court's own interpretation of the common law. Indeed, the Supreme Court of the United States is recognized as a Court of the District of Columbia by the Code. which was enacted March 3, 1901, and went into effect January 1, 1902. It provides in Section 2 as follows:

"SEC. 2. The judicial power in the District shall continue as at present to be vested in—

First. Inferior courts, namely, justices of the peace and the police court; and

"Second. Superior courts, namely, the Supreme Court of the District of Columbia. the Court of Appeals of the District of Columbia, and the Supreme Court of the United States."

Q. Is there any doubt or question as to what the law of the District of Columbia, is on this question as to the liability of a
70 master for punitive damages for the tort of his servant?

A. Absolutely none; it is as stated in the Lake Shore case.

Q. And there is no doubt about it?

A. I have none, sir.

Q. I am going to ask you the same hypothetical question I asked Mr. Jeffords. Assume that a contract is entered into at Summerville, South Carolina, between an individual and a telegraph company, whereby the telegraph company in the ordinary course of its business agrees for a consideration to transmit and deliver to another person, at No. 72 Canal Street, Southwest, Washington, D. C., a message substantially in the following language: "Come at once. Your sister died this morning." Assume that the telegraph company does in fact transmit that message, without material change, from Summerville, South Carolina, to its office in the City of Washington, D. C., that it is thereupon promptly placed in an envelope, properly addressed, and given to a messenger who is instructed to deliver it at 72 Canal Street, S. W. Assume that the messenger, without the knowldge of his superiors, willfully, wantonly and recklessly fails to deliver the message to the addressee. Assume further that the addressee is in fact at No. 72 Canal Street, S. W., and that the addressee in fact never received the message, and that as the proximate result of not receiving the message the addresse, or her husband, or both, failed to be present at the funeral of the addressee's sister, but neither the addressee nor her husband, *not* both jointly, sustained any other actual damage. In your opinion, under the law of the District of Columbia, as it is now and as it was on January 22, 1908, is there any form of civil action in which, under those facts, the addressee or her husband, or both, would be entitled to recover anything beyond nominal damages from the telegraph company, the corporation master employing the messenger boy, for its default or breach of duty, if any, with regard to this message?

A. Absolutely none.

71 Q. And why do you say that in that case there can be no recovery of punitive damages?

A. Because the question does not indicate that the master participated in the wrongful act of the agent, or expressly or impliedly authorized or approved it, either before or after it was committed, or, to use the language of the Court in the Lake Shore case, there is nothing in the question to show that "the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation."

Q. In giving your testimony in this case on a prior occasion, Mr. Millan, the plaintiffs' counsel asked you this question: "Mr. Stark asked you a question which assumed to embody the facts in this case. Assuming that it does embody the facts in this case, but that this messenger boy, acting within the scope of his authority, wilfully and wantonly failed to deliver this telegram, would you say that even in that case there could be no recovery for punitive compensatory damages?" In reply to that the record shows that you made this answer: "I cannot find that that question has been raised or decided in this District, either in a local case or by the Supreme Court of the United States." Just what did you mean by that answer, Mr. Millan, and does it conflict in any way with the testimony you have given today?

A. I think perhaps I did not entirely understand Mr. Grace's question. I have never heard in this District of an action being brought for punitive compensatory damages, and that is what I meant when I said that I could not find that such a question had been decided in this District. Here, civil cases are brought either for punitive damages, or for compensatory damages, or for both kinds of damages in one action, but I know of no kind of damages which might be called "punitive compensatory." I thought I had already made it perfectly plain by my testimony on a prior occasion, and I have tried to make it plain by my testimony today, that there is no doubt whatever as to the law of the District about the recovery of punitive damages against a master for the tort of a servant.

72 *Motion for Nonsuit.*

At the close of the whole case the defendant moved for a non-suit, or a direction of verdict in its favor as to the cause of action based on negligent tort (only) on the grounds set out in its motion for nonsuit at the close of plaintiffs' case and on the additional ground that it now affirmatively appears that there was no default or negligence within the State of South Carolina, and that whatever default or negligence there was on the part of the defendant occurred without the State of South Carolina and within the District of Columbia, and, therefore the Statute entitled "An Act to allow damages against "Telegraph Companies doing business in this State for mental "anguish or suffering, even in the absence of bodily injury caused "by negligence in receiving, transmitting or delivering message," approved the 20th Feb'y, 1901, (Stat. S. C., Vol. 23, page 748), which Act is the foundation of the cause of action based on negligent tort, is, if construed as applicable to the message in this case, unconsitutional and void, because in contravention of three parts of the Federal Constitution, to-wit:

(*a.*) Article 1, Section 8, Subdivision 3 of the Constitution of the United States, conferring on Congress power to regulate commerce among the several States, and

(*b.*) Article 1, Section 8, Subdivision 17 of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and

(*c.*) That part of the Fourteenth Amendment to the Constitution of the United States which provides that no Sate shall deny to any person within jurisdiction the equal protection of the laws.

Which motion was overruled and the non-suit refused by the Presiding Judge in the following language:

The motion is for direction of a verdict and upon the ground that the telegram was sent from Summerville to Washington, D. C. The testimony shows and shows conclusively that the delict occurred in Washington; the plaintiffs do not pretend that it occurred
73 anywhere else. The testimony shows that it occurred in Washington and consisted of the failure of the telegraph company to deliver the telegram to 72 Canal Street.

Now, the contention of the defendant is that the delict occurred in Washington and the case must be governed by the law of Washington. The contention of the defendant is that this is an action entirely for negligence and not upon contract, the right of action for negligence and not for contract, but it seems to me to meet the issue flat-footed that these actions lie in this Court and are maintainable here, and the defendant is answerable here for the delict which occurred in Washington. It is true the Supreme Court in their decision of this case on appeal go on and say: "and even if the delict occurred in Washington, etc." and they take up that view of the case, but my opinion is, that this action lies against the defendant here for the delict which occurred in Washington.

Judge's Charge to the Jury.

Gentlemen of the jury, both sides have requested me to charge certain propositions of law to you, and I will now proceed to do that in the formal language in which they request me. Those propositions which I charge I have marked "Allowed" and those which I refuse I have marked "Refused," and those which I have modified I have interlined with pencil so that the modifications speak for themselves. I will then instruct you as to the law of this case as briefly as possible.

Plaintiffs made following requests to charge, which were charged:

I.

The jury are instructed that all telegraph companies doing business in the State of South Carolina are liable in damages for mental anguish or suffering even in the absence of bodily injury
74 for negligence in receiving, transmitting or delivering messages. And in all such actions the jury may award such

damages as they conclude resulted from the negligence of said Telegraph Company.

Civil Code of S. C., 1902, Sec. 22-2.

Which was allowed.

II.

The jury are instructed that proof of unreasonable delay in delivering a telegram creates a presumption of negligence on the part of the telegraph company.

Poulnot vs. Tel. Co., 69 S. C., p. 545;
Hellams vs. Tel. Co., 70 S. C., p. 87;
Arial vs. Tel. Co., 70 S. C., p. 423;
Baker vs. Tel. Co., 75 S. C., p. 408;
Adv. Sheets, August 30, 1907.

Which was allowed.

III.

The jury are instructed that if they believe from the testimony that a telegram relating to a personal or social matter was sent by way of the defendant company to the plaintiff, and that said defendant company was negligent in delivering said message to the plaintiff, that then the jury may award such damages as they conclude resulted from the negligence of said Telegraph Company if they believe from the testimony that said company was negligent.

Civil Code of 1902, Sec. 22-23.

Which was allowed.

IV.

The jury are instructed that if they believe from the testimony that there was a conscious failure to exercise due care on the part of the defendant company in not delivering the telegram to
75 the addressee thereof and that the plaintiff, Rosa Brown suffered mental anguish as the result of such conscious failure, that then the jury would be warranted in finding a verdict for punitive damages.

Sullivan vs. R. R. Co., 74 S. C., p. 391.

Which was allowed.

V.

The jury are instructed that the duty which the telegraph company owes to the addressee of a message is to deliver such message to the addressee personally or to some one authorized expressly or impliedly to receive it for the addressee.

Glover vs. Tel. Co., 78 S. C., p. 507.

Which was allowed.

VI.

The jury are instructed that if they believe from the testimony that there was a reckless disregard of the rights of the plaintiff,

Rosa Brown, and that as a result of such reckless disregard the plaintiff suffered mental anguish that then the jury as an example to deter others in like circumstances from repeating such acts and to punish the defendant for such conduct may find a verdict for punitive or exemplary damages.

Wade vs. Electric Co., 51 S. C., p. 303.

Which was allowed.

VII.

The jury are instructed that where there is an entire failure to deliver a telegraphic message and an absence of testimony showing a real effort to deliver, the jury would be warranted in finding a verdict for punitive damages.

Bolton vs. Tel. Co., 76 S. C., p. 29;
76 Roberts vs. Tel. Co., 73 S. C., p. 523;
Young vs. Tel. Co., 65 S. C., p. 93;
Willis vs. Tel. Co., 73 S. C., p. 385.

Which was allowed.

The Defendant requested the Judge to charge as follows:

1. The jury are instructed that it is not the duty of a telegraph company to find at its peril the addressee of a telegram, but that if the jury find that the telegraph company exercised reasonable care in their efforts to deliver the telegram, then their verdict must be for the defendant.

Which was charged.

2. Before the plaintiff can recover damages for mental anguish, the jury must find that the telegraph company failed to exercise ordinary care in attempting to deliver the message.

Smith vs. Tel. Co., 72 S. C., p. 118.

Which was allowed.

3. That if the jury find the defendant was negligent, and failed to use reasonable care in delivering said message, then it can award only such actual damages as were suffered by the plaintiff as the direct and proximate result of such failure, and of which the defendant had notice, or should have known, would have resulted from failure to deliver said message.

Which was allowed.

4. Before the plaintiff is entitled to recover for mental anguish he must show, not only that the defendant did not exercise reasonable diligence or ordinary care in delivering the message, but that had it been delivered promptly, the plaintiff after receiving it, by the exercise of reasonable diligence could have seen her dead sister's face, or attended the burial of her deceased sister, and that she not only could have done so, but that she would have done so.

Which was allowed.

77 5. Plaintiff can only recover compensatory damages for such consequences as were within the contemplation of the parties, that is, for such consequences as naturally flow from a breach of defendant's duty, and unless the jury find that the telegram was sufficient to put within contemplation of the defendant company the possibility of a postponement of the funeral, the plaintiff can not recover damages for mental anguish on account of not seeing her dead sister or attending her funeral, on the ground that if she had received the message she could have had the funeral postponed.

Which was allowed.

6. The jury are instructed that there is no evidence in this case to warrant a verdict for punitive damages.

Which was refused.

7. To entitle the plaintiff to punitive damages, the jury must find that the defendant company did not act through mistake, ignorance or mere negligence, but acted wantonly, wilfully or intentionally, or was guilty, not merely of gross negligence, but of negligence so gross as to imply wantonness and wilfulness.

Jones vs. Tel. Co., 75 S. C., p. 211;
Murray vs. Tel. Co., 74 S. C., p. 63;
Watts v. R. R., 60 S. C., p. 74.

Which was allowed.

8. Punitive damages are recoverable when there has been an intentional invasion of plaintiff's rights.

Arial vs. Tel. Co., 70 S. C., p. 424.

Which was allowed.

9. Where there is undisputed evidence of a genuine effort to deliver a telegram, the company is not liable for punitive damages.

Todd vs. Tel. Co., 77 S. C., p. 522.

78 Which was modified by addition of "a genuine" and charged as above.

10. The jury are instructed that under the law of the District of of Columbia, where the tort was committed, the defendant company is not liable for punitive damages for the torts of its servants, even though wilful, unless it personally authorized or subsequently ratified the tort, with full knowledge of the facts.

Which was allowed.

11. That the measure of damages is governed in this case by the law of the District of Columbia, where the tort was committed and under the law of that State, any mental anguish which does not proceed from, or accompany, physical injury, is not an element of damage and cannot be recovered. The jury is, therefore, instructed that the plaintiff cannot recover damages in this case for

the mental anguish she claims to have suffered in not seeing her dead sister's face and attending her funeral.

Which was refused.

11*a*. If the jury find from the evidence, that the sold default of the defendant occurred in the District of Columbia and that there was no breach of duty anywhere else, then the jury are instructed to bring in a verdict for the defendant as far as compensatory damages for mental anguish are concerned.

Which was refused.

11*b*. The jury are instructed that a breach of duty on the part of the telegraph company occurs when it fails to put the message in the hands of the addressee at the place of delivery.

Modified by putting "a" for "the".

11*c*. The jury are instructed that if they find such breach of duty (if any) occurred at Washington in the District of Columbia, that under the law of the District of Columbia, they can not award punitive damages against the defendant unless they find further that not only was the agent of the defendant guilty of
79 a wilful tort, but that the defendant company participated in or actively ratified the act of its agent.

Which was refused.

12 That by the law of the District of Columbia there can be no recovery of punitive damages in this case.

Which was refused.

13. If the jury find from the evidence that the message was promptly and correctly transmitted to the District of Columbia, and that the only negligence or breach of duty occurred there, and that the law of the District of Columbia does not permit of punitive damages against a master, whether corporation or individual, for the wilful tort of a servant unless the master counsels, participates in or actively ratifies such tort, then the jurors cannot award punitive damages against the defendant.

Which was refused.

14. Unless the plaintiffs have proved, by a preponderance of the evidence that there was some default or breach of duty on the part of the defendant within the territorial limits of the State of South Carolina, there can be no recovery of damages for mental anguish, because the statute allowing such damages, if construed as authorizing recovery therefor, where the plaintiff has not proved a default within the State would be unconstitutional and void as in contravention of Article 1, Section 8, Subdivision 3 of the Federal Constitution conferring on Congress power to regulate commerce among the several States; and also of Article 1, Section 8, Subdivision 17 thereof, conferring power on Congress to exercise exclusive legislation over the District of Columbia.

Which was refused.

15. If the jury find from the testimony that there has been no default or breach of duty in the State of South Carolina, and
80 that such default or breach of duty occurred without the State of South Carolina and in the District of Columbia, there can be no recovery of damages for mental anguish, for the Mental Anguish Statute upon which such recovery depends, if construed as authorizing a recovery under such circumstances, would be unconstitutional and void as in contravention of Article 1, Section 8, Subdivision 3 of the Constitution of the United States, conferring on Congress power to regulate commerce among the several States and also Article 1, Section 8, Subdivision 17 thereof, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia.

Which was refused.

16. If the jury find that there was no default or breach of duty within this State, there can be no recovery of damages for mental anguish, as the Mental Anguish Statute, if construed as applying to and authorizing recovery of damages for mental anguish under the circumstances of this case would be unconstitutional and void as in contravention of that part of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Which was refused.

Now gentlemen, the difficulty in this case arises out of the complexity of our system of government, we have different States and diverse laws for these States; we have lines of telegraph stretching from one State to another and your own sense will teach you that there is great difficulty in applying laws to cases of this sort. If a telegraph company receives a message in South Carolina and sends it across two or three other States into Washington and fails to do what it ought to have done at Washington the question will arise in any man's mind to whom is the telegraph company responsible, is it liable to South Carolina and the laws made there or is it liable in North Carolina to the laws made there, because it passed through there, or is it liable to Virginia according to the laws there, be-
81 cause it passed through Virginia, or is it liable to Maryland according to the laws there, because it passed through there, or is it finally liable to Washington; so you see the difficulty is in applying the right law in each individual case. The telegraph company contends that this telegram was delivered to it at Summerville, that it immediately received and transmitted it to Washington and that if any default occurred it was at Washington. The plaintiff contends that the telegram was not delivered to the addressee, and the contention of the telegraph company is that if that is so that it had breached the law of Washington and not the law of South Carolina; it failed in the performance of its duty at Washington, and, therefore, is liable to the law there, but as you heard me say, according to my view the Supreme Court has settled that question against the

telegraph company. This case was tried two years ago and the Judge took that view and directed a verdict, and an appeal was taken to the Supreme Court, and as I understand the law the telegraph company is liable for what it did under the laws of this State, and its rights and remedies are under the laws of the State of South Carolina, and I conceive it to be my duty to so instruct you and to exulain to you what the law of South Carolina in a case like this is. This action is primarily based on a section of the Code of the State of South Carolina, it is short, and you can understand it as well as anybody else; here is the Statute: "Telegraph companies shall be liable in damages," that is plain enough, a telegraph company shall be liable in damages for what? "for mental anguish or suffering" for what? "for negligence in receiving, transmitting or delivering messages, and the jury may award such damages as they conclude resulted from such negligence." Now, that brings us to this inquiry, has the telegraph company been negligent, because the Statute only gives the party damages in the event that the company has been negligent. Has this telegraph company in this case been negligent in what it undertook to do? Negligence is the failure to do what a party ought to do, what he reasonably ought to do; if a man does what he reasonably ought to have done; if he does what a man under like circumstances would have done, he has done all
82 he need do; he is not required to reach the height of excellence, he is only required to do what an ordinary man in the ordinary walk of life does, and if he does that he has done his duty and is not responsible for the consequences. Now, in this case, was the telegraph company negligent? The negligence charged in this case was the failure to deliver the telegram; if the telegram was received at Summerville, if it was transmitted along the wires to Washington in due time and received off the wires there, and if it was put in the hands of a telegraph boy there, did the telegraph boy do his duty about the delivery? Now, ordinarily, a telegram must be delivered to the party for whom it is intended, because common sense teaches that he is the party to receive it, but that is not always the rule, the telegraph company may deliver it to him or some one authorized to receive it, but not anybody; a telegraph boy with a telegram is bound to make delivery to the party to whom it is addressed or to some person expressedly or impliedly authorized by him to receive it. Now, you have heard the testimony in this case, if the telegraph boy in this case delivered this telegram to a woman, was she such a woman as was authorized expressedly by the addressee or impliedly to receive it; if so and they delivered it to her they did their duty and are not liable; if it failed to do what a reasonable and well conducted telegraph company ought to have done then it is convicted of negligence. If you find it has done its duty that ends the case and you write a verdict for the defendant. If you conclude, however, from the testimony, that the telegraph company failed in delivering this telegram, then you go a step further and inquire what the damages are. The mere fact that it failed to deliver does not entitle the plaintiff to damages. The Statute says "shall be liable in damages for mental anguish and suffering which approximately resulted

therefrom. Now, it is not pretended that the woman was hurt in her body, it is not pretended that there was a scratch on her person, so they have not claimed she is entitled to damages for injuries to her body, but she claims she is entitled to damages for mental anguish and suffering. Now, how can a jury measure mental anguish
83 and suffering; you cannot take it and weigh it like an apothecary does medicine or a grocer does groceries, but you know your own self, you know your own heart and you know other men, and it is for the jury to say whether or not the failure of the telegraphic company to deliver that message, if they did fail, caused the plaintiff mental suffering and anguish, and if such mental anguish and suffering sprung out of the failure of the defendant to deliver that message. If you are so satisfied you go a step further and inquire how much is that mental suffering and anguish worth in dollars and cents; how much will you award to the woman for mental anguish and suffering, that is called compensatory damages. If, Mr. Foreman, you are driving down the street in a buggy and another man driving in an opposite direction runs into you and breaks your wheel and it costs you five dollars to mend it your actual damages are five dollars; those are damages to compensate you for the breaking of your wheel and you would be entitled to recover five dollars to put you in the same position as you were in before to compensate you for the damage; but the plaintiff goes one step further, and by the plaintiff I mean the woman, she charges that what the telegraph company did was not only negligent but was wilful. Now, get that into your head, negligence means one thing and wilfulness means another; the woman claims that she is not only entitled to recover for negligence but for wilfulness too. Now, wilfulness is this, it is the conscious failure of a person to do that which they know they ought to do; for instance, if a telegraph company has a telegram for a man, they know it is for him, know it is about an important matter, know he ought to receive it, and if they close their eyes and say they don't care whether he receives it or not, I know it is my duty to deliver it but I am not going to perform my duty, that would be a case of wilfulness, that would be a case of a party failing to do what they knew they ought to do and for that wilful act in the nature of a criminal act the law allows the jury to inflict upon the party money damages, called punitive damages, distinctive from compensatory damages. Now, the plaintiff claims, in this case, that the telegraph company acted in that spirit. Now, you will take up that
84 issue and say, did the telegraph company know that they had this telegram, were they conscious of the fact that it was their duty to deliver it, did they know they were not delivering it, was their conduct so reprehensible as to warrant the jury in awarding or inflicting punitive damages on them. You have heard the testimony, was there a bona fide effort to deliver it, did the company attempt to do what they ought to have done, was that attempt a bona fide attempt, such an attempt as a man in the ordinary course of business would have exercised, if so, then the jury would not be warranted in finding a verdict against the telegraph company for punitive damages. If, on the other hand, you conclude that the

telegraph company knew its duty, and it consciously, because it didn't care about the rights of the woman or anybody else, did not deliver the telegram, then the jury would be warranted in finding a verdict for punitive damages. Now, gentlemen, I have written out the form of your verdict; you may write one of two verdicts. If you find for the plaintiff, say we find for the plaintiff so many dollars damages for negligence; and if you find the act was wilful, say we find for the plaintiff so many dollars damages for wilfulness, and sign your name as foreman so I will know a verdict for negligence or negligence and wilfulness; or if you find for the defendant, say we find for the defendant and sign your name as foreman. Take the record and write your verdict inside under the cross mark I have made.

The jury returned the following verdict:

"We find for the plaintiff $750.00 damages for negligence," and judgment having been entered thereon and notice of appeal duly given, the following exceptions were duly served:

Exceptions.

I.

That his Honor, the Presiding Judge, erred in overruling defendant's objection to and admitting the following testimony:

85 "Q. When you got to Summerville what did you find?
A. She was dead and buried.
Q. Was that or not the first time you knew she was dead?
A. Yes, sir; that was the first time.
Q. When was it you came to Summerville—how long ago after the burial?
A. The second day; she died on the 22d, and I got the letter on the 24th. She died Wednesday and I got the letter on Friday.
Q. Then you came?
A. Yes, sir.
Q. Rosa, when did you get this letter?
A. On the 24th.
Q. When you got that letter what did you do?
A. I began to pack my trunk.
Q. To come on?
A. Yes, sir.
Q. Did you come immediately, in response to that letter?
A. Yes, sir.
Q. What was the date of the letter?
A. That letter was dated 22d and I got it on the 24th.
Q. When you got to Summerville when did you first hear of the death of your sister?
A. I did not hear until I got home in the house."

Whereas, it is respectfully submitted that the said testimony was immaterial and irrelevant, as defendant was only liable in damages

(if liable at all) for mental anguish caused to the plaintiff by being deprived of seeing her dead sister and of attending her funeral and burial, and the defendant could not be held liable for any mental anguish of the plaintiff caused by the death of her sister and knowledge thereof, and that where, how and when, she acquired such knowledge is irrelevant and immaterial and is entirely apart and disconnected from the message that was sent, the failure to deliver which, prevented her being present at her sister's funeral and
86 seeing her dead body, and for which alone she could be entitled to recover damages

That this result could not have been contemplated from the wording of the message, and no notice thereof to the company was given.

II.

Because the Court erred in not granting defendant's motion for a non-suit at the close of the plaintiff's case, on the ground that there was not only no allegation in the complaint, but no testimony whatsoever, that plaintiff paid or promised to pay, for the transmission of the message or that the sender paid or promised to pay therefor, or that there was any consideration to the defendant.

III.

Because the Court below erred in refusing to grant the defendant's motion for a non-suit made at the close of the plaintiff's case as to the cause of action based on negligent tort (only) on the ground that it affirmatively appeared from the plaintiff's own case that the message sued on was an interstate message and that it did not appear that there was any default or breach of duty with regard thereto on the part of the defendant within the territorial limits of the State of South Carolina, and the defendant maintains that the Statute entitled "An Act to allow damages against Telegraph Companies doing "business in this State for mental anguish or suffering even in the "absence of bodily injury caused by negligence in receiving, trans-"mitting and delivering messages," approved Feb., 1901. (Stat. S. C., Vol. 23, p. 748), which act is the foundation of the cause of action based on negligent tort, is, if construed as applicable to the message in this case, unconstitutional and void because in contravention of the Federal Constitution, to-wit:

(*a*) Article 1, Section 8, Subdivision 3 of the Constitution of the United States, conferring on Congress power to regulate commerce among the several States, and
87 (*b*) Article 1, Section 8, Subdivision 17 of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and

(*c*) That part of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

IV.

That the Court below erred in refusing the defendant's motion for a non-suit or a direction of verdict in its favor at the close of the whole case as to the cause of action based on negligent tort (only) on the grounds set out in defendant's motion for a non-suit at the close of the plaintiff's case and on the additional ground that it then affirmatively appeared that there was no default or negligence within the State of South Carolina, and that whatever default or negligence there was on the part of the defendant occurred without the State of South Carolina and within the District of Columbia and therefore, as the message sued on was an interstate message, the defendant maintains that the Statute entitled "An Act to allow dam- " ages against Telegraph Companies doing business in this State for " mental anguish or suffering even in the absence of bodily injury " caused by negligence in receiving, transmitting and delivering " messages," approved 20th Feb., 1901. (Stat. S. C., Vol. 23, p. 748), which act is the foundation of the cause of action based on negligent tort, is, if construed as applicable to the message in this case, unconstitutional and void in contravention of three parts of the Federal Constitution, to-wit:

(*a*) Article 1, Section 8, Subdivision 3 of the Constitution of the United States, conferring on Congress power to regulate commerce among the several States, and

(*b*) Article 1, Section 8, Subdivision 17 of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all case whatsoever over the District of Co-
88 lumbia, and

(*c*) That part of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

V.

That his Honor, the Presiding Judge, erred in refusing to charge the eleventh request of the defendant, which was as follows:

"That the measure of damages is governed in this case by the law " of the District of Columbia, where the tort was committed, and " under the law of that State any mental anguish which does not " proceed from, or accompany, physical injury, is not an element of " damage and cannot be recovered. The jury is, therefore, instructed " that the plaintiff cannot recover damages in this case for the mental " anguish she claims to have suffered in not seeing her dead sister's " face and attending her funeral."

VI.

That his Honor, the Presiding Judge, erred in refusing to charge the request of the defendant numbered '11*a*" which was as follows:

"If the jury find from the evidence that the sole default of the " defendant occurred in the District of Columbia and that there was

"no breach of duty anywhere else, then the jury are instructed to "bring in a verdict for the defendant as far as compensatory dam- "ages for mental anguish are concerned."

VII.

That his Honor, the Presiding Judge, erred in refusing to charge the Fourteenth request of the defendant, which was as follows:

89 "Unless the plaintiffs have proved by a preponderance of "the evidence that there was some default or breach of duty "on the part of the defendant within the territorial limits of the "State of South Carolina, there can be no recovery of damages for "mental anguish, because the Statute allowing such damages, if "construed as authorizing recovery therefor, where the plaintiff has "not proved a default within the State, would be unconstitutional "and void as in contravention of Article 1, Sec. 8, Subdivision 3 of "the Federal Constitution conferring on Congress power to regulate "commerce among the several States; and, also, of Article 1, Section "8, Subdivision 17 thereof, conferring power on Congress to exercise "exclusive legislation over the District of Columbia."

VIII.

That his Honor, the Presiding Judge, erred in refusing to charge the Fifteenth request of the defendant, which was as follows:

"If the jury find from the testimony that there has been no default "or breach of duty in the State of South Carolina, and that such "default or breach occurred without the State of South Carolina and "in the District of Columbia, there can be no recovery of damages for "mental anguish, for the mental anguish Statutes upon which such "recovery depends, if construed as authorizing a recovery under such "circumstances, would be unconstitutional and void as in contraven- "tion of Article 1, Sec. 8, Subdivision 3 of the Constitution of the "United States, conferring on Congress power to regulate commerce "among the several States and also of Article 1, Sec. 8, Subdivision "17 thereof, conferring power on Congress to exercise exclusive legis- "lation in all cases whatsoever over the District of Columbia."

90 IX.

That his Honor, the Presiding Judge, erred in refusing to charge the Sixteenth request of the defendant, which was as follows:

"If the jury find that there was no default or breach of duty "within this State, there can be no recovery of damages for mental "anguish (as the Mental Anguish Statute, if construed as applying "to and authorizing recovery of damages for mental anguish) under "the circumstances of this case would be unconstitutional and void "as in contravention of that part of the Fourteenth Amendment to "the Constitution of the United States which provides that no State "shall deny to any person within its jurisdiction the equal pro- "tection of the laws."

X.

That his Honor, the Presiding Judge, erred in charging the jury that the defendant telegraph company is liable for what it did under the laws of the State of South Carolina, and its right and remedies are under the laws of that State, irrespective of where the act of negligence may have occurred.

MITCHELL & SMITH,
Attorneys for Defendant-Appellant.

A true copy,

[Seal Supreme Court of South Carolina.]
U. R. BROOKS, *Clerk.*

91 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
against
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Opinion by EUGENE B. GARY, *C. J.*:

This is an action for damages, alleged to have been sustained by the plaintiff, Rosa Brown, through the wrongful acts of the defendant, in failing to deliver the following telegram:

"SUMMERVILLE, S. C., *January* 22, 1908.

Mrs. W. M. Brown, No. 72 Canal St., S. W., Washington, D. C.:

Come at once. Your sister died this morning.
FREDERIKA ALSTEN."

The jury rendered a verdict in favor of the plaintiff, for seven hundred and fifty dollars for negligence, thus eliminating the question, as to the right of the plaintiff to recover punitive damages.

The appeal is from the refusal of his Honor, the presiding Judge, to grant the motion for nonsuit, and the direction of a verdict; also from his refusal to charge certain requests, and from certain parts of his charge, alleged to be erroneous.

This is the second appeal in this case—the first being reported in 85 S. C. 495.

The appellant's exception will be incorporated, in the report of the case.

The first exception cannot be sustained, for the reason that even if the testimony therein mentioned, was immaterial and
92 irrelevant, the appellant has failed to show, that it was prejudicial to its rights.

The second exception was withdrawn.

All the other questions presented by the exceptions herein, were involved upon the former appeal, and were determined adversely to the contention of the appellant. They are therefore subject to the doctrine of res adjudicata, and, even if the rulings then made were erroneous, they could not be corrected in this case. Jones v. Ry., 65 S. C. 410.

These questions were also presented, upon a petition for a rehearing on the former appeal in this case, but were again decided against the petitioner, and the petition dismissed. Again they were affirmed in the case of Heath v. Tel. Co. 87 S. C. 219, and still again in the case of Boyd v. Tel. Co. 88 S. C. 518. In the last mentioned case, the Court had under consideration the question, whether the addressee of a telegram, in a State which has not a mental anguish statute, has the right of recovery in this state, for delay in delivering a message sent from this State to that, without reference to where the delay occurred; and ruled that he did have such right.

In reversing the Circuit Judge this Court merely said: "This question has undergone judicial investigation *as* recently that we deem it only necessary to cite the cases of Brown v. Tel. Co. 85 S. C. 495, and Heath v. Tel. Co. 87 S. C. 219, to show that the exceptions raising this exception, must be sustained."

These exceptions are therefore overruled.

Judgment affirmed.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

93 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Petition for Writ of Error.

Western Union Telegraph Company, Defendant Appellant in the above entitled cause, feeling itself aggrieved by the verdict of the Jury and the judgment entered therein and the final judgment and decree of the Supreme Court of the State of South Carolina, filed on the 28th day of August, 1912 comes now by George H. Fearons and Mitchell & Smith, its attorneys, and petitions said Court for an Order allowing said Defendant to prosecute a writ of error to the Honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and

provided, and also that an Order be made fixing the amount of security which the Defendant shall give and furnish upon said Writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States and your Petitioner will ever pray.

September 7th, 1912.

GEORGE H. FEARONS,
MITCHELL & SMITH,
Attorneys for Defendant,
Western Union Telegraph Company.

94 [Endorsed:] State of South Carolina, Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Petition for Writ of Error. Original. George H. Fearons, Mitchell & Smith, Att'ys for Def'd't-Appellant. Filed Supreme Court of S. C., Sept. 7, 1912. U. R. Brooks, Clerk.

95 In the Supreme Court.

STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Assignment of Errors.

And now comes the Defendant, Western Union Telegraph Company, Plaintiff in error, by its Counsel and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the Supreme Court of South Carolina in the above entitled cause and assigns error thereto as follows:

1. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Third (3rd) Exception, and should have held that "the Court below erred in refus-
" ing to grant the defendant's motion for a non-suit made at the
" close of the plaintiff's case as to the cause of action based on negli-
" gent tort (only) on the ground that it affirmatively appeared from
" the plaintiff's own case that the message sued on was an interstate
" message and that it did not appear that there was any default or
" breach of duty with regard thereto on the part of the defendant
" within the territorial limits of the State of South Carolina, and
" the defendant maintains that the Statute entitled 'An Act to allow
" ' damages against Telegraph Companies doing business in this
" ' State for mental anguish or suffering even in the absence of
" ' bodily injury caused by negligence in receiving, transmitting
" ' and delivering messages,' approved Feb., 1901 (Stat. S. C., Vol.

"23, p. 748), which act is the foundation of the cause of
96 "action based on negligent tort, is, if construed as applicable
"to the message in this case, unconstitutional and void be-
"cause in contravention of the Federal Constitution, to wit:

"(*a*) Article I, Section 8, Subdivision 3 of the Constitution of "the United States, conferring on Congress power to regulate com-"merce among the several States, and

"(*b*) Article I, Section 8, Subdivision 17 of the Constitution of "the United States, conferring power on Congress to exercise exclu-"sive legislation in all cases whatsoever over the District of Colum-"bia, and

"(*c*) That part of the Fourteenth Amendment to the Constitu-"tion of the United States which provides that no State shall deny "to any person within its jurisdiction the equal protection of the "laws."

2. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Fourth (4th) Exception and should have held "that the Court below erred in "refusing the defendant's motion for a non-suit or a direction of "verdict in its favor at the close of the whole case as to the cause "of action based on negligent tort (only) on the grounds set out "in defendant's motion for a non-suit at the close of the plaintiff's "case and on the additional ground that it then affirmatively ap-"peared that there was no default or negligence within the State of "South Carolina, and that whatever default or negligence there was "on the part of the defendant occurred without the State of South "Carolina and within the District of Columbia and, therefore, as "the message sued on was an interstate message, the defendant main-"tains that the Statute entitled 'An Act to allow damages against "'Telegraph Companies doing business in this State for mental
"'anguish or suffering even in the absence of bodily injury
97 "'caused by negligence in receiving, transmitting and de-
"'livering messages,' approved 20th Feb., 1901. (Stat. S. C., "Vol. 23, p. 748) which act is the foundation for the cause of action "based on negligent tort, is, if construed as applicable to the mes-"sage in this case, unconstitutional and void in contravention of "three parts of the Federal Constitution, to wit:

"(*a*) Article I, Section 8, Subdivision 3 of the Constitution of "United States, conferring on Congress power to regulate commerce "among the several States, and

"(*b*) Article I, Section 8, Subdivision 17 of the Constitution of "the United States, conferring power on Congress to exercise exclu-"sive legislation in all cases whatsoever over the District of Colum-"bia, and

"(*c*) That part of the Fourteenth Amendment to the Constitu-"tion of the United States which provides that no State shall deny "to any person within its jurisdiction the equal protection of the "laws."

3. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Fifth (5th) Exception, and should have held that the Court below "erred in refus-

" ing to charge the Eleventh request of the defendant, which was as " follows:

" ' That the measure of damages is governed in this case by the " ' law of the District of Columbia, where the tort was committed, " ' and under the law of that State any mental anguish which does " ' not proceed from, or accompany, physical injury, is not an ele- " ' ment of damage and cannot be recovered. The jury is, there- " ' fore, instructed that the plaintiff cannot recover damages in this " ' case for the mental anguish she claims to have suffered in not " ' seeing her dead sister's face and attending her funeral.' "

98 4. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Sixth (6th) Exception and should have held that the Court below " erred in refusing to charge the request of the defendant numbered " '11*a*' which was as follows:

" 'If the jury find from the evidence that the sole default of the " ' defendant occurred in the District of Columbia and that there " ' was no breach of duty anywhere else then the jury are instructed " ' to bring in a verdict for the defendant as far as compensatory " ' damages for mental anguish are concerned.' "

5. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Seventh (7th) Exception, and should have held that the Court below "erred in " refusing to charge the Fourteenth request of the defendant, which " was as follows:

" 'Unless the plaintiffs have proved by a preponderance of the " ' evidence that there was some default or breach of duty on the " ' part of the defendant within the territorial limits of the State of " ' South Carolina, there can be no recovery of damages for mental " ' anguish, because the Statute allowing such damages, if construed " ' as authorizing recovery therefor, where the plaintiff has not " ' proved a default within the State, would be unconstitutional and " ' void as in contravention of Article I, Sec. 8, Subdivision 3 of the " ' Federal Constitution conferring on Congress power to regulate " ' commerce among the several States; and, also, of Article I, Sec- " ' tion 8, Subdivision 17 thereof, conferring power on Congress to " ' exercise exclusive legislation over the District of Columbia.' "

99 6. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Eighth (8th) Exception, and should have held that the Court below "erred in refusing to charge the Fifteenth request of the de- " fendant, which was as follows:

" 'If the jury find from the testimony that there has been no de- " ' fault or breach of duty in the State of South Carolina, and that " ' such default or breach occurred without the State of South Caro- " ' lina and in the District of Columbia, there can be no recovery of " ' damages for mental anguish, for the mental anguish Statutes " ' upon which such recovery depends if construed as authorizing a " ' recovery under such circumstances, would be unconstitutional and " ' void as in contravention of Article I, Sec. 8, Subdivision 3 of the " ' Constitution of the United States, conferring on Congress power " ' to regulate commerce among the several States and also of Article

"'I, Sec. 8, Subdivision 17 thereof, conferring power on Congress "'to exercise exclusive legislation in all cases whatsoever over the "'District of Columbia.'"

7. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Ninth (9th) Exception, and should have held that the Court below "erred in refus- "ing to charge the Sixteenth request of the defendant, which was "as follows:

"'If the jury find that there was no default or breach of duty "'within this State, there can be no recovery of damages for mental "'anguish, (as the Mental Anguish Statute, if construed as apply- "'ing to and authorizing recovery of damages for mental anguish) "'under the circumstances of this case would be unconstitutional "'and void as in contravention of that part of the Fourteenth "'Amendment to the Constitution of the United States which pro- "'vides that no State shall deny to any person within its jurisdic- "'tion the equal protection of the laws."

100 8. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Tenth (10th) Exception, and should have held that the Court below "erred in charging the jury that the defendant telegraph company "is liable for what it did under the laws of the State of South Caro- "lina, and its right and remedies are under the laws of that State, "irrespective of where the act of negligence may have occurred."

9. That the Supreme Court of South Carolina erred in holding and deciding that the questions presented by the appeal to the Supreme Court of South Carolina were res adjudicata and concluded by the former appeal in the case, whereas the Court should have held that the points involving the Constitutional questions and the rights of the Defendant under the Constitution of the United States were not raised by the former appeal and the decision on the former appeal was not a final judgment from which an appeal could have been taken to the Supreme Court of the United States and the Court erred in denying to the Defendant the consideration of those questions and in overruling the same.

Wherefore the said Western Union Telegraph Company, Plaintiff in error, prays this Honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of South Carolina, entered in the said case of William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, against Western Union Telegraph Company, Defendant-Appellant as aforesaid.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

By GEORGE H. FEARONS,
MITCHELL & SMITH, *Its Attorneys.*

September 7th, 1912.

101 [Endorsed:] State of South Carolina, Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Assignment of Errors.

Original. George H. Fearons, Mitchell & Smith, Att'ys for Def'd't-Appellant. Filed Supreme Court of S. C., Sept. 7, 1912. U. R. Brooks, Clerk.

102 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Order.

The Defendant, Western Union Telegraph Company, having this day filed its Petition for a writ of error from the decision and judgment thereon made and entered herein, to the Supreme Court of the United States, together with an Assignment of errors within due time, and also praying that an Order be made fixing the amount of security which Defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said Supreme Court of the United States and said Petition having this day been duly allowed:

Now, Therefore, It Is Ordered That upon the said Defendant, Western Union Telegraph Company, filing with the Clerk of this Court a good and sufficient bond in the sum of Fifteen Hundred Dollars to the effect, that if the said Defendant, Western Union Telegraph Company, and Plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said Bond to be approved by the Court that all further proceedings in this Court be, and they are hereby
103 suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

Dated 7 Sept. 1912.

EUGENE B. GARY,
Chief Justice of Supreme Court of South Carolina.

104 [Endorsed:] State of South Carolina, Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Order. Filed Supreme Court of S. C. Sept. 7, 1912. U. R. Brooks, Clerk.

105 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,

vs.

WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of South Carolina, before you or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Western Union Telegraph Company, Defendant and Plaintiff in error, and William Brown and Rosa Brown, his wife Plaintiffs and Defendants in error, wherein was drawn in question the validity of a Statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity and wherein was drawn in question the construction of a clause of the Constitution of or of a Statute of the United States, and the decision was against the right, title, privileges or exemption specially set up or claimed under such clause of the said Constitution or Statute, a mani-

106 fest error hath happened, to the great damage of the said Western Union Telegraph Company, Plaintiff in error, as by its Complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same in the said Supreme Court at Washington within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, the Seventh day of September, A. D. 1912.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

[Seal United States District Court, Eastern District So. Ca.]

RICHARD W. HUTSON,
Clerk U. S. District Court, South Carolina.

Allowed by:

EUGENE B. GARY,
Chief Justice of the Supreme Court
of the State of South Carolina.

107 [Endorsed:] State of South Carolina. Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Writ of Error. Original. And a copy hereof for the adverse party lodged in this office Sept. 7, 1912. U. R. Brooks, Clerk. Filed Supreme Court, Sept. 7, 1912. U. R. Brooks, Clerk.

108 UNITED STATES OF AMERICA,
District of South Carolina, ss:

I hereby certify that I have served the within Citation on Messrs. Logan & Grace, Attorneys of Record for the within named William Brown and Rosa Brown, Plaintiffs-Respondents, on the 9th day of September, A. D. 1912 at their office, No. 40 Broad Street, in the City of Charleston, in the District aforesaid by then and there delivering to W. Turner Logan, Esquire, a member of the firm of Logan & Grace, personally and leaving with him, a true copy of the within citation.

Dated at Charleston, in the District of South Carolina, this 10th day of September, 1912.

[Seal U. S. Marshals Office, District of So. Carolina.]

J. DUNCAN ADAMS,
U. S. Marshal,
By N. W. PORTER, *Deputy.*

109 UNITED STATES OF AMERICA,
District of South Carolina:

I hereby certify that I served the within Citation on Messrs. Logan & Grace, Attorneys of record, for the within named William Brown and Rosa Brown, Plaintiffs-Respondents on the 7th day of September, 1912, in the City and County of Charleston, in the District of South Carolina, at their office Number 40 Broad Street by delivering to and leaving with J. A. Patla, temporarily in charge of said office personally, a true copy of the within citation, both members of the firm, to wit, Mr. W. Turner Logan and Mr. John P. Grace, and the Plaintiffs-Respondents themselves, being absent from the said City and County.

[Seal U. S. Marshals Office, District of So. Carolina.]

J. DUNCAN ADAMS,
U. S. Marshal for the District
of South Carolina,
By N. W. PORTER, *Deputy.*

110 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Brown and Rosa Brown, his wife, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of South Carolina, wherein Western Union Telegraph Company is Plaintiff in error and you are Defendants in error, to show cause if any there be, why the judgment rendered against the said Plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 7 *Sept.* day of September, in the year of our Lord One thousand nine hundred and twelve and of the Independence of the United States the One hundred and thirty seventh.

EUGENE B. GARY,
Chief Justice.

111 We acknowledge service of within citation and delivery of copy to us at Charleston, S. C., this 7th day of September. 1912.

——— ———,
——— ———,
Attorneys for Plaintiffs-Respondents.

[Endorsed:] 563. State of South Carolina. Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Citation. Original.

112 UNITED STATES OF AMERICA,
District of South Carolina, ss:

I hereby certify That I have served the within Citation on Messrs. Logan & Grace, Attorneys of Record for the within named William Brown and Rosa Brown, Plaintiffs-Respondents, on the 4th day of October, A. D. 1912 at their office, No. 40 Broad Street, in the

City of Charleston, in the District aforesaid by then and there delivering to W. Turner Logan, Esquire, a member of the firm of Logan & Grace, personally and leaving with him, a true copy of the within citation.

Dated at Charleston, in the District of South Carolina, this 4th day of October, 1912.

[Seal U. S. Marshal Office, District of So. Carolina.]

J. D. ADAMS,
U. S. Marshal,
By J. L. ADAMS, *Deputy.*

113 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Brown and Rosa Brown, his wife, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of South Carolina, wherein Western Union Telegraph Company is Plaintiff in error and you are Defendants in error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Eugene B. Gary, Chief Justice of the Supreme Court of the State of South Carolina, this Seventh day of September, in the year of our Lord One thousand nine hundred and twelve and of the Independence of the United States the One hundred and thirty seventh.

EUGENE B. GARY.

[Seal United States District Court, Eastern District, So. Ca.]

RICHARD W. HUTSON,
Clerk U. S. District Court, South Carolina.

114 [Endorsed:] 563. State of South Carolina. Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Citation. Original.

115 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Order.

In the Supreme Court of the State of South Carolina, Present the Honorable Eugene B. Gary, Chief Justice of the said Court.

Upon motion of George H. Fearons and Mitchell & Smith, Attorneys for Defendant, and upon filing a Petition for a writ of error and an assignment of errors;

It is ordered That a writ of error be, and hereby is, allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein and the final judgment and decree of the Supreme Court of the State of South Carolina heretofore entered herein on the 28th day of August, 1912 and that the amount of Bond on said writ of error be, and hereby is fixed at Fifteen Hundred Dollars.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

Dated 7th September, 1912.

116 [Endorsed:] State of South Carolina. Ninth Circuit, Charleston County. In the Supreme Court. William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Order. Filed Supreme Court of S. C., Sept. 7, 1912. U. R. Brooks, Clerk.

117 STATE OF SOUTH CAROLINA,
Ninth Circuit, Charleston County:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Bond.

Know all men by these presents That we, Western Union Telegraph Company, a corporation under the laws of the State of New York, as Principal, and Fidelity and Deposit Company of Maryland, a corporation under the laws of Maryland of Baltimore, Md., as

surety, are held and firmly bound unto William Brown and Rosa Brown, his wife, Plaintiffs above named in the full and just sum of Fifteen hundred ($1,500 00/100) Dollars, to be paid to the said William Brown and Rosa Brown, his wife, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves and each of us and our and each of our Successors, Representatives and Assigns, jointly and severally, firmly by these presents.

Sealed with our Seals and dated the Seventh (7) day of September, in the year of our Lord One thousand nine hundred and twelve.

Whereas lately, at a session of the Supreme Court for the State of South Carolina, in a suit pending in said Court between said William Brown and Rosa Brown, plaintiffs respondents,
118 against said Western Union Telegraph Company, Defendants-Appellants, a final judgment or decree was rendered against the said Western Union Telegraph Company, and the said Western Union Telegraph Company has obtained the allowance of and sued out a writ of error to the Supreme Court of the United States of America and filed a copy thereof in the Clerk's office, to reverse the judgment or decree in the above entitled cause by the Supreme Court of the State of South Carolina and a citation directed to the said William Brown and Rosa Brown, his wife, is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date thereof.

Now, therefore, the Condition of this Obligation is such that if the above bound Western Union Telegraph Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this Obligation shall be void; otherwise it shall remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY,
By E. JOHNSON, *Mgr.* [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By F. H. HORLBECK, [SEAL.]
Attorney in Fact.

Attest,
J. T. COLEMAN, *Agent.*

Signed, sealed and delivered in the presence of:
M. S. BOOKMAN.
C. DEAS GADSDEN.

Approved to act as supersedeas.
EUGENE B. GARY,
Chief Justice.

119 Form "A" Judicial.

Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know all men by these presents:

That the Fidelity and Deposit Company of Maryland, by John H. Wight its Vice-President, and J. D. Mahon its Assistant Secretary, in pursuance of authority granted by Section 3, Article VI, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint Julian Mitchell, Frederick H. Horlbeck, J. J. Pringle Smith, J. T. Coleman and J. Walker Coleman, all of the City of Charleston, State of South Carolina, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf and as its act and deed, all bonds or undertakings of suretyship required to be given by Order or Decree of any Court of Law or Equity of the State of South Carolina, or in the United States Circuit or District Courts for said State, and for Trustees and Receivers in Bankruptcy proceedings under the Bankrupt Act of the United States. Such bonds to be signed for the Company by either said Julian Mitchell, Frederick H. Horlbeck or J. J. Pringle Smith, as attorney-in-fact, and attested, as agent, and the seal of the Company affixed by either said J. T. Coleman or J. Walker Coleman.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper per-
120 sons. This power of attorney revokes that issued June 30th, 1910, in behalf of Henry A. M. Smith et al.

In witness whereof, the said John H. Wight, Vice-President, and J. D. Mahon, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 6th day of May, 1912.

JOHN H. WIGHT,
Vice-President.

Attest:
[SEAL.] J. D. MAHON,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 6th day of May, A. D. 1912, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified came John H. Wight, Vice-President, and J. D. Mahon, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be

the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

[SEAL.]

FRED S. AXTELL,
Notary Public.

121-122 *Extract from By-Laws of the Fidelity and Deposit Company of Maryland, Adopted by the Stockholders of said Company on June 1st, 1910.*

"ARTICLE VI, SECTION 3. The President, or any of the Vice-Presidents, shall have power by and with the concurrence of the Secretary or any of the Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person or persons to execute on behalf of the Company, any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto."

I, J. D. Mahon, Assistant Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the aforegoing is a true copy of Section 3, Article VI, of the By-Laws of said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 6th day of May, A. D. 1912.

[SEAL.]

J. D. MAHON,
Assistant Secretary.

123 STATE OF SOUTH CAROLINA,
Charleston County, Ninth Circuit:

In the Supreme Court.

WILLIAM BROWN and ROSA BROWN, His Wife, Plaintiffs-Respondents,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

Præcipe.

To the Clerk of the Above Entitled Court:

You will please prepare Transcript of the Record in this cause to be filed in the Office of the Clerk of the Supreme Court of the United

States at Washington, D. C., under the writ of error heretofore allowed by said Court and include in said Transcript the following pleadings proceedings and papers on file, to wit:

1. Printed "Case" and Exceptions.
2. The Opinion and the Remittitur or judgment of the Court thereon.
3. Petition for Writ of Error.
4. Assignment of Errors.
5. Order allowing the same.
6. Writ of Error.
7. Citation and Proof of service thereof.
8. Order of supersedeas.
9. Bond.
10. This præcipe with Proof of service thereof.

Said Transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the
124 United States and on file at the office of the Clerk of the Supreme Court of the United States at Washington, D. C., on or before the return day mentioned in said Writ of error.

GEO. H. FEARONS,
MITCHELL & SMITH,
Attorneys for Defendant-Appellant and Plaintiff in error.

September 11th, 1912.

125 [Endorsed:] State of South Carolina, Charleston County, Ninth Circuit. In the Supreme Court. William Brown, and Rosa Brown, his wife, Plaintiffs-Respondents, vs. Western Union Telegraph Company, Defendant-Appellant. Præcipe. Mitchell & Smith, Attorneys for Defendant-Appellant. Original.

We acknowledge service of a copy of the within at Charleston, S. C. this 11th September 1912 upon us.

LOGAN & GRACE,
Counsel for Plaintiffs-Respondents.

126 I, U. R. Brooks, Clerk of the Supreme Court of South Carolina, do hereby certify, That the foregoing are true, full and correct copies of the "Case" and Exceptions, Judgment, Remittitur and Opinion rendered by the Court in the case of William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, against Western Union Telegraph Company, Defendant-Appellant, all of which are now on file in my office and are parts of the record in said case.

Given under my Hand and the Seal of the Court at Columbia, this twelfth day of September, in the year of our Lord One Thousand nine hundred and twelve and in the One hundred and thirty seventh year of the Independence of the United States of America.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

127 I, U. R. Brooks, Clerk of the Supreme Court of South Carolina, do hereby certify the foregoing to be a true, full and complete copy of the Record and of the Assignment of Errors, and of all proceedings in the case of William Brown and Rosa Brown, his wife, Plaintiffs-Respondents, against Western Union Telegraph Company, Defendant-Appellant, which are now on file in my office, and I do further certify that the opinion rendered by the Court in said case is a part of the record of said case. I do further certify that the Original Writ of Error granted on the 7th day of September, 1912, a copy of which is now on file in my office and the assignment of errors thereon, and the Order of Allowance and the Petition therefor and the original Citation and Proof of Service and the Order of Supersedeas and a copy of the Bond, the original being now on file in my office, and the Præcipe herein, are hereunto attached.

Given under my Hand and the Seal of the Court at Columbia, this seventh day of September, in the year of our Lord One housand nine hundred and twelve and in the One hundred and thirty seventh year of the Independence of the United States of America.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of South Carolina.

Endorsed on cover: File No. 23,377. South Carolina Supreme Court. Term No. 355. Western Union Telegraph Company, plaintiff in error, vs. William Brown and Rosa Brown, his wife. Filed October 8th, 1912. File No. 23,377.

2

Office Supreme Court, U. S.
FILED
MAR 20 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 355.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

WILLIAM BROWN and ROSA BROWN, his wife,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF PLAINTIFF IN ERROR.

RUSH TAGGART,
GEORGE H. FEARONS,
JULIAN MITCHELL,
FRANCIS RAYMOND STARK,
Attorneys for Plaintiff in Error.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

CONTENTS OF BRIEF.

PAGE

Statement of Case and Nature of Action 1
History of the Litigation 4
Federal Questions Presented 4
Errors Assigned 5
How Federal Questions Raised 9

ARGUMENT AND CASES CITED.

I.

STATUTE UNCONSTITUTIONAL BECAUSE IT DENIES THE EQUAL PROTECTION OF THE LAWS.

(1)

History of previous attempts to raise the question 11

(2)

Summary of decisions of this court 15
Classification of telegraph companies upheld for certain purposes, like classification of railroads 19
In spite of numerous exceptions Ellis case still represents general principle of law 20

(3)

Classification of telegraph companies for purposes of civil liability for mental anguish different from any classification heretofore sustained under police power and violates fundamental principle recognized in Ellis case 23

(a)

Classification essentially different from any heretofore sustained 23

PAGE

(*b*)

Classification violates fundamental principle recognized in Ellis case 25
American Sugar Refining Co. vs. Louisiana, 179 U. S. 89 .. 16
Atchison, Topeka & Santa Fe Ry. Co. vs. Matthews, 174 U. S. 96 17
Barbier vs. Connolly, 113 U. S. 27 17
Beers vs. Glynn, 211 U. S. 477 16
Capers vs. W. U. Tel. Co., 71 S. C. 29; 50 S. E. 537 14
Connelly vs. W. U. Tel. Co., 100 Va. 51; 40 S. E. 618 13
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540 16
Ferguson advs. W. U. Tel. Co., 157 Ind. 37 12
Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150 20
Hayes vs. Missouri, 120 U. S. 68 17
Home Insurance Co. vs. New York, 134 U. S. 594 16
Ivy vs. W. U. Tel. Co., 165 Fed. 371 11
Ivy advs. W. U. Tel. Co., 177 Fed. 63 11
Lewis vs. W. U. Tel. Co., 57 S. C. 325; 35 S. E. 556 26
Magoun vs. Illinois Trust and Savings Bank, 170 U. S. 283 16
Minneapolis and St. L. Ry. Co. vs. Herrick, 127 U. S. 210 17
Minneapolis and S. L. Ry. Co. vs. Beckwith, 129 U. S. 26 17
Missouri vs. Lewis, 11 Otto 22 17
Missouri Pacific Railway Co. vs. Humes, 115 U. S. 512 .. 17
Missouri Pacific Railway Co. vs. Mackey, 127 U. S. 205 .. 17
Nitka vs. W. U. Tel. Co., 135 N. W. 492; 149 Wis. 106 .. 15
Pembina, etc., Mining Co. vs. Pennsylvania, 125 U. S. 181 16
Seaboard Air Line Ry. Co. vs. Seegers, 207 U. S. 73 18
Simmons vs. W. U. Tel. Co., 63 S. C. 425; 4 S. E. 521 ... 13
Soon Hing vs. Crowley, 113 U. S. 703 17
Strauder vs. West Virginia, 100 U. S. 303 17
St. Louis and San Francisco Ry. Co. vs. Matthews, 165 U. S. 1 17
Wadsworth vs. W. U. Tel. Co., 86 Tenn. 695; 8 S. W. 574 27
Western Union Telegraph Co. vs. Commercial Mill. Co., 218 U. S. 406 19

PAGE

Western Union Telegraph Co. vs. Crovo, 220 U S. 364... 19
W. U. Tel. Co. vs. Ferguson, 157 Ind. 37..... 12
Western Union Telegraph Co. vs. James, 162 U. S. 650 .. 19
Western Union Telegraph Co. vs. Indiana, 165 U. S. 304.. 16
Western Union Telegraph Co. vs. Ivy, 177 Fed. 63..... 11
W. U. Tel. Co. vs. Winland, 182 Fed. 493 11

II.

THE STATUTE IS UNCONSTITUTIONAL, AS TO INTERSTATE MESSAGES AT LEAST, UNDER THE COMMERCE CLAUSE, WHERE THERE HAS BEEN NO BREACH OF DUTY BY THE TELEGRAPH COMPANY WITHIN THE STATE.

(1)

No breach in South Carolina..... 29

(2)

The message in this case was interstate commerce and not subject to regulation by the State of South Carolina 30

(3)

Any statute is an invalid regulation of interstate commerce which imposes a liability outside of that created by the contract and unknown to the common law for an act or omission occurring in the course of interstate transportation or transmission entirely outside the borders of the state..... 31
Western Union vs. Commercial Milling Company distinguished 33
Same principle constantly recognized in other than telegraph cases..... 34
Present statute unconstitutional on principle involved in any of foregoing cases..... 38
Adams Exp. Co. vs. Croninger, 226 U. S. 500 35
Birkett vs. W. U. Tel. Co., 103 Mich. 361..... 34
Chicago, &c., R. R. vs. Polt, 34 Sup. Ct. Rep. 301 37
Chicago, etc., Ry. Co. vs. Solan, 169 U. S. 133 34

PAGE

Hanley vs. Kansas City So. Ry. Co., 187 U. S. 617 31
Jacob vs. W. U. Tel. Co., 135 Mich. 600 34
Missouri Pacific Ry. Co. vs. Kansas, 216 U. S. 262 36
Pendleton advs. W. U. Tel. Co., 122 U. S. 347 30
Pennsylvania Ry. Co. vs. Hughes, 191 U. S. 477 35
Stoutenburgh vs. Hennick, 129 U. S. 141 31
W. U. Tel. Co. vs. Carew, 15 Mich. 525 33
Western Union Telegraph Co. vs. Commercial Mill. Co., 218 U. S. 406 31
Western Union Telegraph Co. vs. Crovo, 220 U. S. 364 31
Western Union Telegraph Co. vs. James, 162 U. S. 650 31
Western Union Telegraph Co. vs. Pendleton, 122 U. S. 347 30
Yazoo, etc., Ry. Co. vs. Jackson Vinegar Co., 226 U. S. 217 37

III.

THE STATUTE IS UNCONSTITUTIONAL BECAUSE CONFLICTING WITH THE EXCLUSIVE LEGISLATIVE POWER OF CONGRESS IN THE DISTRICT OF COLUMBIA.

Western Union Telegraph Co. vs. Chiles, 214 U. S. 274 41
W. U. Tel. Co. vs. Greer, 115 Tenn. 368 43
W. U. Tel. Co. vs. Snodgrass, 94 Tex. 283 43

In the Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, AGAINST WILLIAM BROWN and ROSA BROWN, his wife, Defendants in Error.	No. 355.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error to the supreme court of the State of South Carolina bringing up for review a final judgment of that court, filed on August 28, 1912 (record, page 63) affirming a judgment of the Court of Common Pleas of the County of Charleston in the same State entered on the verdict of a jury for seven hundred and fifty and $\frac{00}{100}$ ($750.00) dollars, in favor of the defendants in error (plaintiffs below) against the plaintiff in error (defendant below) for *compensatory damages for mental anguish, unaccompanied by other injury or loss*, sustained by the female plaintiff (with whom her husband is joined simply *pro forma*) in consequence of her failure, through the negligence of the defendant below, to receive a telegraphic message.

Nature of Action.

Prior to 1901, the law in South Carolina was settled that there could be no recovery of actual damages for mental anguish unaccompanied by physical injury in *an action founded on negligent tort* where the defendant happened

to be a telegraph company any more than in a similar action against any other kind of a defendant. By chapter XXIII. of the Laws of 1901 however, now incorporated as section 2223 into the civil code of South Carolina (1902), it was provided that

> "All telegraph companies doing business in this State shall be liable in damages for mental anguish or suffering even in the absence of bodily injury, for negligence in receiving, transmitting or delivering messages.
>
> "Nothing contained in this section shall abridge the rights or remedies now provided by law against telegraph companies, and the rights and remedies provided for by this section shall be in addition to those now existing.
>
> "In all actions under this section the jury may award such damages as they conclude resulted from negligence of said telegraph companies."

Apart from the statute it had always been the law in South Carolina that in an action for wilful tort against a telegraph company (or any one else) the jury might, under proper instructions, award punitive damages; and this rule of law applied as well to an action against a corporation based on the tort of a servant, where the wilfulness or malice was that of the servant, as to an action against an individual.

Under the statute above set forth it has become the custom in South Carolina for the addressee of a delayed message to sue the telegraph company and unite in one complaint, in a single count, two independent causes of action, namely (1) a common law cause of action founded on the allegation that the delay of the message was a wilful tort, in consequence of which plaintiff claims to be entitled to recover punitive damages, and (2) a statutory cause of action under the Act of 1901 on the theory that the defendant's act, if not wilful, was at least negligent, and that as the proximate consequence of such negligence the plaintiff suffered mental anguish. By the State practice it is permissible to unite these two independent causes of action in one count without separately stating or numbering them (see Machen vs. W. U., 72 S. C. 256; Young vs. W. U., 65 S. C. 99; Arial vs. W. U., 70 S. C. 424); and the usual practice was followed in this case.

The Undisputed Facts.

On January 22, 1908, one Fredericka Alston filed with the defendant below at Summerville, S. C., a telegraph message addressed to the female plaintiff, Mrs. W. M. Brown, at 72 Canal Street S. W., Washington, D. C., in the following language:

"Come at once. Your sister died this morning."

This message was promptly and correctly transmitted, *without any fault on the part of the telegraph company within the borders of the State of South Carolina*, to the company's office in the City of Washington, D. C., but was not delivered to the addressee. Had it been promptly delivered, as it should have been, the addressee could and for the purposes of this writ of error it must be assumed that she would have gone to Summerville, S. C., and been present at the funeral of her deceased sister. As it was, however, she did not attend the funeral and was "sorry" on that account (record, page 7). No actual damage was proved, and none was claimed, to have resulted from the delay of the message except mental anguish on the part of the female plaintiff, and the exact testimony as to the nature and extent of this "damage"—and all the testimony there is on the subject—was as follows (record, page 7):

"Q. You did not get there in time to attend the funeral service?
"A. No, sir.
"Q. Were you fond of your sister?
"A. Yes, sir.
"*Q. Were you sorry at not being able to see her?*
"*A. Yes, sir.*"

For this "sorrow" the jury has awarded the plaintiffs seven hundred and fifty dollars. While it was further claimed by the plaintiffs that defendant's conduct at Washington, D. C., amounted to wilful tort, for which punitive damages were asked, the jury has found for the defendant as to punitive damages and that cause of action need not be considered here.

History of Litigation.

The action was commenced on March 31, 1908. The first trial resulted in a directed verdict in favor of the defendant on both the cause of action for mental anguish under the statute and the cause of action for wilful tort. The plaintiffs appealed to the Supreme Court of the State, which reversed the judgment and ordered a new trial as to both causes of action (85 S. C. 495, 67 S. E. 146; rehearing denied April 19, 1910), holding as to the cause of action for mental anguish under the statute that the law of South Carolina controlled, and as to the cause of action for wilful tort that it was at least a question of fact for the jury whether the law of the District of Columbia, where the alleged wilfulness occurred, by which law the defendant contended there could be no recovery of punitive damages against a master for the tort of a servant unless the master had personally participated in or personally ratified the tort, was or was not different from the law of South Carolina in this regard.

On the second trial both causes of action were submitted to the jury, which brought in a verdict for fifteen hundred and $\frac{00}{100}$ dollars ($1,500.00). This verdict was set aside by the trial court as excessive.

On the third trial both causes of action were again submitted to the jury and the jury found for the defendant on the cause of action for wilful tort and found for the plaintiffs for seven hundred and fifty and $\frac{00}{100}$ dollars ($750.00) on the cause of action for mental anguish under the statute. The trial court refused to set aside the verdict, and the judgment entered thereon has been affirmed by the Supreme Court of South Carolina, to which court, for the purpose of reviewing the final disposition of the case thus made in that court (record, page 63) the present writ of error is directed.

The Federal Questions.

The case in this court presents, in various forms, three questions arising under the Constitution of the United States:

(1) Is not the mental anguish statute of South Carolina

unconstitutional generally, because it denies to telegraph companies within the jurisdiction of the State of South Carolina the equal protection of the laws under the Fourteenth Amendment?

(2) Is it not unconstitutional, as to interstate messages at least, where there is an entire absence of any breach of duty by the telegraph company within the State of South Carolina, under the commerce clause (Article I., section 8, subdivision 3)?

(3) Is it not unconstitutional at any rate as to messages sent from South Carolina to the District of Columbia, where the sole breach of duty on the part of the telegraph company occurs exclusively within the District, under Article I., section 8, subdivision 17 of the Constitution of the United States, conferring power on Congress to exercise exclusive legislation in all cases whatsoever over the District of Columbia?

Errors Assigned.

These three questions are presented on the record by formal assignments of error as follows (record, pages 64 to 67):

> 1. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Third (3rd) Exception, and should have held that "the Court below erred in refusing to grant "the defendant's motion for a non-suit made at the "close of the plaintiff's case as to the cause of action "based on negligent tort (only) on the ground that it "affirmatively appeared from the plaintiff's own case that "the message sued on was an interstate message and "that it did not appear that there was any default or "breach of duty with regard thereto on the part of the "defendant within the territorial limits of the State of "South Carolina, and the defendant maintains that the "Statute entitled 'An Act to allow damages against "'Telegraph Companies doing business in this State "'for mental anguish or suffering even in the absence "'of bodily injury caused by negligence in receiving, "'transmitting and delivering messages,' approved "Feb., 1901 (Stat. S. C., Vol. 23, p. 748), which act is "the foundation of the cause of action based on neg-"ligent tort, is, if construed as applicable to the mes-

" sage in this case, unconstitutional and void because " in contravention of the Federal Constitution, to wit:

" (*a*) Article 1, Section 8, Subdivision 3, of the Con- " stitution of the United States, conferring on Congress " power to regulate commerce among the several States, " and

" (*b*) Article 1, Section 8, Subdivision 17, of the " Constitution of the United States, conferring power " on Congress to exercise exclusive legislation in all " cases whatsoever over the District of Columbia, and

" (*c*) That part of the Fourteenth Amendment to the " Constitution of the United States which provides that " no State shall deny to any person within its jurisdic- " tion the equal protection of the laws."

2. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Fourth (4th) Exception and should have held " that the Court below erred in refusing the de- " fendant's motion for a non-suit or a direction of ver- " dict in its favor at the close of the whole case as to " the cause of action based on negligent tort (only) on " the grounds set out in defendant's motion for a non- " suit at the close of the plaintiff's case and on the ad- " ditional ground that it then affirmatively appeared " that there was no default or negligence within the " State of South Carolina, and that whatever default or " negligence there was on the part of the defendant " occurred without the State of South Carolina and " within the District of Columbia, and, therefore, as the " message sued on was an interstate message, the de- " fendant maintains that the Statute entitled 'An Act " ' to allow damages against Telegraph Companies do- " ' ing business in this State for mental anguish or suf- " ' fering even in the absence of bodily injury caused by " ' negligence in receiving, transmitting and delivering " ' messages,' approved 20th Feb., 1901 (Stat. S. C., " Vol. 23, p. 748), which act is the foundation for the " cause of action based on negligent tort, is, if con- " strued as applicable to the message in this case, un- " constitutional and void in contravention of three parts " of the Federal Constitution, to wit:

" (*a*) Article 1, Section 8, Subdivision 3 of the Con- " stitution of United States, conferring on Congress power " to regulate commerce among the several States, and

" (*b*) Article 1, Section 8, Subdivision 17 of the Con- " stitution of the United States, conferring power on " Congress to exercise exclusive legislation in all cases " whatsoever over the District of Columbia, and

" (*c*) That part of the Fourteenth Amendment to

" the Constitution of the United States which provides " that no State shall deny to any person within its " jurisdiction the equal protection of the laws."

3. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Fifth (5th) Exception, and should have held that the Court below " erred in refusing to charge the " Eleventh request of the defendant, which was as " follows :

" ' That the measure of damages is governed in this " ' case by the law of the District of Columbia, where " ' the tort was committed, and under the law of that " ' State any mental anguish which does not proceed " ' from, or accompany, physical injury, is not an ele- " ' ment of damage and cannot be recovered. The jury " ' is, therefore, instructed that the plaintiff cannot re- " ' cover damages in this case for the mental anguish " ' she claims to have suffered in not seeing her dead " ' sister's face and attending her funeral.' "

4. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Sixth (6th) Exception and should have held that the Court below " erred in refusing to charge the " request of the defendant numbered '11*a*,' which was " as follows :

" ' If the jury find from the evidence that the sole " ' default of the defendant occurred in the District of " ' Columbia and that there was no breach of duty any- " ' where else then the jury are instructed to bring in a " ' verdict for the defendant as far as compensatory " ' damages for mental anguish are concerned.' "

5. That the Supreme Court of South Carolina erred in overruling and refusing to sustain the Defendant-Appellant's Seventh (7th) Exception, and should have held that the Court below " erred in refusing to charge " the Fourteenth request of the defendant, which was " as follows :

" ' Unless the plaintiffs have proved by a prepon- " ' derance of the evidence that there was some default " ' or breach of duty on the part of the defendant " ' within the territorial limits of the State of South " ' Carolina, there can be no recovery of damages for " ' mental anguish, because the Statute allowing such " ' damages, if construed as authorizing recovery there- " ' for, where the plaintiff has not proved a default " ' within the State, would be unconstitutional and void " ' as in contravention of Article 1, Sec. 8, Sub livision 3 " ' of the Federal Constitution conferring on Congress " ' power to regulate commerce among the several